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REPORTS

John of White

515

CASES AT LAW AND IN EQUITY,

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF ALABAMA,

During January Term, and part of June Term, 1844.

BY THE JUDGES OF THE COURT.

40566

VOL. VI—NEW SERIES.

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IN THE SUPREME COURT.

JANUARY TERM, 1845.

Amendment to the rules for the regulation of the Practice in Chancery, adopted the 31st January, 1845.

1. The twenty-first rule for the regulation of the practice in chancery, adopted by this Court at its term holden in January, 1841: and the ninth rule of the additional rules, for the regulation of the practice in chancery, adopted by this Court, at its term holden in June, 1842, are hereby abolished.

2. Orders of publication against non-resident defendants may be made on supplemental bills, and bills of revivor, as directed in rule number two, of the additional rules for the regulation of the practice in chancery, adopted at June term, 1842; and after the expiration of the time required to answer or shew cause, the supplemental bill may be taken *pro confesso*, or the suit revived as to such non-resident defendant.

Regula Generalis.

The cases in the Supreme Court shall hereafter be taken up and disposed of in the following order:

1. The Southern Division composed of the sixth circuit.

2. The Eastern Division composed of the second and eighth circuits, and the counties of Autauga, Coosa, Macon and Russell.

3. North Eastern Division composed of Cherokee, Benton, St. Clair, Shelby, Talladega, Randolph, Tallapoosa and Chambers.

4. The Western Division composed of the counties of Perry, Greene, Sumter, Marengo and Pickens.

5. North Western Division composed of the remainder of the Northern Division as it existed heretofore.

REPORTS

OF

CASES ARGUED AND DETERMINED,

JANUARY TERM, 1844.

POWERS v. DAVID.

1. When the complaint in a suit of forcible entry, and detainer bears a date nearly two years subsequent to the time of the trial, it will be considered as a clerical error, and therefore unavailable.
2. A defendant will not be permitted, in an appellate court, to raise a question of jurisdiction, by showing a fact, by affidavits, when the same matter is not disclosed by the record.
3. It is not a material error, that the record, in a suit of forcible entry and detainer, does not shew whether an issue was formed by the parties, or the plea of not guilty entered by the court.
4. If there is a general verdict that the defendant is guilty of an unlawful detainer, and the judgment is "according to the verdict, both will be referred to the complaint, which, if sufficient in the description of the lands, and of the offence, will sustain the judgment.

WRIT of Error to the Circuit Court of Mobile county.

This is an action for a forcible entry and unlawful detainer, instituted by David against Mrs. Powers, before a justice of the peace of Mobile county. After verdict and judgment against the defendant, she removed the cause into the circuit court, by *certiorari*, and there assigned as error:

1. That the proceedings were instituted without a written complaint, as required by the statute.

2. That the *venire* was not returnable at any place.

3. That the summons was not returnable at any place.

4. That the court was held at a place not within the jurisdiction of the justice, *to wit*, within the walls of Fort Stoddart, which is a place within the exclusive jurisdiction of the United States.

5. That there was no issue, as required by the statute.

6. There was no judgment rendered by the justice.

The circuit court affirmed the judgment of the justice of the peace; and on this judgment of affirmance, the defendant prosecutes her writ of error, and by the assignments of error here, opens the whole case.

The second and third assignments were abandoned in this court, and so much of the record as is necessary to the understanding of the other questions raised, will be stated.

In the record sent up by the justice of the peace, is found a complaint, which purports to be signed by the plaintiff, but is dated 10th October, 1842. The summons and *venire* were both dated 12th October, 1840, and the trial was had the 24th of the same month.

The judgment entry recites, that the court being opened, it proceeded to call the jury, of which three were absent, and others were called in their stead. The jury was then sworn; the complaint read to them, and the complainant called on to support it. Then follows a recital of the evidence given by the plaintiff's witnesses; after which, the record states the examination of the witnesses closed, and the jury, after a short deliberation, presented the following verdict. "We, the jury, find the defendant, Solomon Powers, guilty of unlawful detainer:" and this judgment was then entered. "Judgment given according to the verdict of the jury."

In aid of the 4th assignment of error, the counsel offered to read an affidavit by one of the jurors, that the trial was had within the walls of the Arsenal in Mobile county, which includes 15

or 20 acres of land, and is in part occupied by soldiers of the United States army, and is also a place where recruits are enlisted. This affidavit was rejected.

J. F. ADAMS, for the plaintiff in error.
CAMPBELL, *contra*, was stopped by the court.

GOLDTHWAITE, J.—1. The first assignment of error is not sustained, in point of fact, by the record, as there is a complaint in writing sent up by the magistrate. It is true, this complaint bears a date nearly two years subsequent to the other proceedings, but this does not authorise the inference that it has been interpolated. On the contrary, the presumption is strong that the date is a mere clerical error, and such we feel constrained to consider it. The consequence is, that this assignment is unavailable.

2. Next in order, as the second and third assignments have been abandoned, is the fourth; and this also cannot be considered for the same reason that the record does not show the fact upon which the error is supposed to arise. Waiving any consideration of the question, it is certain that no part of the record shows that the trial was had at the place asserted by the assignment, or indeed at any other place liable to exception. It is not competent for a party in an appellate court, to present a fact by affidavit which the record does not disclose. There was then no error in refusing to consider the affidavit, and without it, the question of jurisdiction no where appears.

3. It is next asserted, there was no issue, and its absence is insisted on as a fatal defect. This would not be the consequence even if the parties had both appeared, for the course of practice is to presume its existence when the parties have gone to the jury. But the statute which governs these proceedings expressly directs the justice of the peace, when the defendant does not appear, or appearing, does not plead, to proceed in the same manner as if he had pleaded not guilty. [Clay's Dig. 252, § 10.] The inference that the defendant did not appear, is very strong, and the proceedings seem to be quite regular if such was the fact, and not defective in this respect if it was otherwise.

4. It is true there is no formal judgment in this case, nor are we aware that it is usual to render one in these proceedings any

more than in other suits before courts of this description. Th statute makes it the duty of the justice of the peace to record th verdict and give judgment thereon with costs. [Clay's Dig. 252 § 13.] To expect technical precision and adherence to form i this class of our courts, would not only end in disappointmen but would also very frequently work great injustice to suitors b causing reversals of judgments for reasons not affecting the jus tice of the conclusions arrived at. The verdict in this case, is general and must be applied to the complaint before the jury, for no inference is admissible that the unlawful detainer found by them, referred to any other lands, or any other offences than those described in the complaint; and as by reference to that, the lands and the offence can be ascertained with precision, the judgment must be considered formal, as it can be made correct. This construction is in accordance with a practice now well established and sustained by numerous decisions. [Spann v. Boyd, 2 Stew. 480; Wyatt v. Judge, 7 Porter, 37.]

We are satisfied there is no error in the case to which our attention is directed by the assignments, sufficient to reverse the judgment. Judgment affirmed.

CRAWFORD v. THE BRANCH BANK AT MOBILE.

1. The drawer of a foreign bill of exchange is liable upon it, according to the law of the place where the bill is drawn.
2. When a bill of exchange is drawn in Alabama, upon a person in Washington City, the drawer is liable, upon its dishonor, to pay the damages, and interest provided by the law of this State.

ERROR to the Circuit Court of Mobile.

THIS was an action of *assumpsit* in the court below by the defendant against the plaintiff in error, on the following bill of exchange.

Mobile, March 26, 1840.

$600.

Gent.—Four months after date of this, first of exchange second of same tenor and date unpaid, pay to David Files, or order, six hundred dollars, for value received, and charge the same to

Your obedient servant,

WM. CRAWFORD.

To C. L. FONLEN, Esq. Washington City.

The defendant failing to appear and plead at the return term of the writ, judgment was rendered against him by default, at the succeeding term for seven hundred and sixty-five dollars sixty cents, and costs.

The defendant prosecutes this writ, and now assigns for error,

1. The cause was discontinued by failing to continue it.

2. The bill was payable in Washington city; interest and damage could not, therefore be calculated on the bill without the intervention of a jury.

The plaintiff in error, submitted a written argument, and cited Minor'sRep. 98; 2 Ala. Rep. 294; 9 ib. 10.

B. F. PORTER, *contra*, cited, Minor 395; Aik. Digest, 248, § 15; 284, §145; 1 Ala. Rep. 80; Greenleaf on Ev. 538, § 490; Story on Bills of Exchange, 171, § 153.

ORMOND, J.—The statute, [Aik. Dig. 284, § 145,] continues all causes which remain on the docket undisposed of until the succeeding term, without any action of the court in each particular case. In addition, it may be added, that the act of February, 1839, which prohibits a judgment from being rendered but by the consent of the parties at the appearance term, is in law a continuance of the cause until the ensuing or trial term.

By the act of drawing a bill, it is true that the drawer directs the payment of the money to the payee, or holder, at the place where the bill is payable; but the drawing of the bill creates also a conditional liability upon the drawer, that if the bill is not paid by the drawer, upon receiving notice of that fact, he will pay it. His undertaking is not to pay the bill at the place where it is payable, but at the place where it is drawn upon default of the drawee, and by the law of the latter place must his liability on the bill be

ascertained. At least such are the legal inferences and consequences flowing from the mere fact of drawing a foreign bill; whether it is not competent for the parties, by contract, to create a law for themselves, by which the drawer on the dishonor of the bill should be liable as to damages and interest, according to the law of the place upon which the bill was drawn, need not be decided here.

By the law of this State [Alk. Dig. 328, § 3, 4, 5 & 7,] the liability of the different parties to a bill of exchange is ascertained and defined; by that law, it is expressly declared, that the damages upon a protested bill drawn on persons without the limits of this territory shall be ten per cent. besides *legal* interest, from and after the date of the protest, which by the express provisions of the act, applies both to the drawer and endorsers.

By the use of the term "legal interest," we think it indisputable that the Legislature meant the rate of interest established by law in this State; it is therefore unnecessary to consider what is the rule of the law merchant in such cases, though we do not doubt that an examination of the mercantile law would establish conclusively that our statute is merely in affirmance of it. [See Story on Bills, 172, and authorities cited in note 2.] The case of Hanrick v. Andrews, [9 Porter, 9,] determines no principle adverse to the view here taken, nor was the question here discussed, presented on the record. Some general remarks, it is true may be found in the reasoning of the court, which considered apart from the point under discussion, lend some countenance to the view taken by the plaintiff in error. If, however, it were clearly and explicitly stated as the plaintiff in error supposes, not being a point raised upon the record, it is no authority in this court.

Upon the application of the plaintiff in error a *re-argument* of the cause was directed, which being had, the following opinion was delivered.

GOLDTHWAITE, J.—A re-hearing was granted in this case at the last term, on motion of the plaintiff in error, and we have since then given much consideration to the written argument then submitted; but, notwithstanding, the court continues to hold the opinion that the judgment of the circuit court must be affirmed.

The contract of the drawer of a bill of exchange, is not a con-

tract to pay the sum of money named in it, at the place upon which it is drawn; it is only a contract that the bill shall be accepted, and then paid by the drawee; and farther, for the payment of the sum of money, and such other sum as will indemnify the holder, at the place where the bill is drawn, if it is not accepted or not paid, and is protested and notice duly given.—[Story on Bills, § 107, 114, 118.] And this indemnity is governed by the law of the place where the bill is drawn, and not that of the place where it is made payable—[Id. § 176, and note 2, § 177.] This is sufficiently evident, when it is considered that a suit may be brought against the drawer immediately upon giving him due notice of the non-acceptance of the bill, and its protest for that cause, if it be a foreign one. [Milford vs. Meyer, Doug'l, 54.] In such a suit, although no interest would run until the maturity of the bill, the judgment would carry interest according to the law of the place where obtained, entirely independent of the circumstance, whether the bill had or had not, run to maturity.

So, likewise, it is evident, from a consideration of the rules which regulate exchange and re-exchange in those countries where damages *eo nomine* are not given in lieu of these matters. In DeTastet vs. Baring, 11 East. 265, it is said that the holder has the right to re-draw for the precise sum which will produce the amount of the bill when payable, with the necessary expenses upon it. And in Mellish vs. Simeon, 2 Hen. Black. 378, an instance is given where a bill for £600 or more, was increased to £900 and upwards, by an accumulation of re-exchanges. In the latter case it was held that the drawer in London, was responsible there for all this accumulation. It is entirely evident, that if the holder of the bill is authorised by the general law merchant to re-draw, that the money for the re-draft is payable at sight, at the place from whence the dishonored bill was drawn; and consequently, if not paid, the money is then due, and bears interest according to the law of that place. So well settled is this rule, that Mr. Chitty recommends to his readers that it may frequently be important to limit the amount of re-exchange and expenses, as well as interest, by the terms of the bill. [Chitty on Bills, 666; Story on Bills, § 397 to 401, and notes.

Judgment affirmed.

McGEHEE v. LINDSAY.

1. An act of the Legislature was passed, providing for the improvement of the navigation of a river, and under its direction, three commissioners were elected, who were required to cause estimates of the work to be made, and adopt the cheapest and most practicable plan for its completion, by letting the same to contract, in divisions, &c. to the lowest responsible bidder. To insure faithfulness on the part of the commissioners, they were required to take an oath to discharge their duties to the best of their skill and ability; one of them took an interest in a contract, which the board let, for doing the entire work, and brought an action against one of the several contractors, to recover his proportion of the money which the defendant had received; *Held*, that the agreement, by which the commissioner was let into the participation of an interest in the contract, was against public policy, a fraud on the State, and could not be enforced.

WRIT of Error to the County Court of Benton.

The defendant in error declared against the plaintiff, in assumpsit for money had and received, paid, laid out and expended, as well as for money lent and advanced. The cause was tried upon the general issue, with leave to give any special matters in evidence that might be pleaded in bar. On the trial the defendant excepted to the ruling of the court. From the bill of exceptions, it appears that the plaintiff proved by a witness, that he (plaintiff) had an obligation on the defendant for the payment of a sum of money, which was delivered by plaintiff's wife, by his directions, to one Brasher, who carried it to the defendant's house; but not finding him at home, Brasher handed him the paper shortly afterwards, upon meeting him in the road. After some conversation, defendant tore up the paper, requesting the witness to tell the plaintiff his money was ready for him. This occurred in January, 1840. Brasher also had an obligation for the payment of money made by the defendant; but neither that or the one held by the plaintiff, was read to or by the witness. The plaintiff, Brasher and Henry Looney, were commissioners elected by the legislature to contract for the improvement of the navigation of the Coosa river,

under the acts of the 19th December, 1837, and the 1st February, 1839.

The plaintiff introduced another witness, who stated that on the 4th of July, 1839, the commissioners, pursuant to previous notice, let the contract for the improvement of the navigation of the Coosa. The plaintiff was chairman of the board, and the defendant, together with Wm. H. Moore, Wm. Hogan, Benjamin F. Powell and Jacob T. Bradford, composed a company who bid off the contract at $54,650. Witness and Hogan wrote and put in the bids for the company, which ranged from $40,000 to near $60,000; witness' bid being $50,000, was forfeited, and the work undertaken at the price stated above, which was the next lowest responsible bid, and a bond for its completion executed by Wm. McGehee & Co. Besides the bids of the company, there were many others for different sections of the work, and one which proposed to undertake the entire work, as well as witness recollects, for $55,500. Witness thinks that plaintiff, before the contract was made, gave him to understand that he was to be, and must be interested in it. This understanding was derived from the plaintiff in various conversations; and witness knows that the matter of the plaintiff's being interested in the contract, was fully discussed by the company.

A few days after the contract was made, the members of the company met at the defendant's house, and entered into articles of agreement, defining their name, style, &c. In the company there were eight shares, of which the defendant represented three, Powell two, John Looney one, Bradford one, and Moore one; of the three shares represented by the defendant, the plaintiff was to have one and Brasher another. Brasher did not attend the meeting at the defendant's house, but the plaintiff was present and understood, and agreed to the arrangement of the shares, and was to have an equal share of all the profits. The defendant was the treasurer of the company, and while acting in that character, he received a check from the plaintiff, as chairman of the commissioners, on which he received and retained the money for the prosecution of the work.

In January, 1840, the witness understood from Powell, the then treasurer, that he had on each of the shares ready to be paid over, the sum of one thousand dollars, besides enough money to

continue the work until another check could be obtained. Witness received one thousand dollars, which he immediately paid over to Bradford, but did not see any other member of the company receive money from the treasurer; nor did he ever hear plaintiff make any claim on the defendant, or know of his having any except such as was founded on the transactions above stated.

On this evidence the court charged the jury, that if after the contract was made, the defendant, or company, let the plaintiff have a share therein, and money was received, either by the defendant or the company, the plantiff might maintain his action to rever the amount so received for him against the persons who had it. *Further*, that if there was a partnership between the plaintiff and defendant, and no settlement of their accounts had taken place, the former was not entitled to recover. The defendant then prayed the court to charge the jury as follows: 1. If they believed all the evidence adduced to be true, they must find for the defendant. 2. If they believed that the plaintiff had shown no claim on defendant except such as is founded on some agreement and understanding, had and entered into by the plaintiff, as a commissioner appointed by the legislature, they must find for the defendant. Both of which charges were refused; the jury returned a verdict for the plaintiff, for the sum of one thousand dollars, and a judgment was rendered accordingly.

S. F. Rice, for the plaintiff in error.—The proof very clearly shows that the plaintiff below was interested with the defendant and others, in the contract which was made for the improvement of the navigation of the Coosa. The agency which he had as one of the commissioners of the State in making the contract, utterly disqualified him from undertaking its performance himself, or from being concerned, either directly or indirectly, with others. [9 Porter's Rep. 40, 68; 1 Ala. Rep. 34, 622; 4 Yeates' Rep. 84; 1 Caine's Rep. 104; 5 Mass. Rep. 385, 541; 4 Id. 370; 11 Wheat. Rep. 258; 8 Johns. Rep. 444; 6 Id. 194.] The duties of the plaintiff as a commissioner, did not cease when the contract was made, but he was to supervise its completion. Both the first and the second charges should have been given. [See 5 Mass. Rep. 541, and Pamphlet Acts of Legislature of 1837, p. 13; Acts of 1838, p. 62]

W. B MARTIN, for the defendant.—The facts do not show that the plaintiff participated in a contract which, as to him, was against policy, and which his relation to the public forbid him from entering into; and there is, consequently, no error, either in the charges given to the jury, or in those refused. [2 A. K. Marsh. Rep. 542; 7 Taunt. Rep. 246; 11 Serg't & R. Rep. 164; 13 Serg't & R. Rep. 29; 4 Mass. Rep. 370; 8 Id. 385; 2 Bing. Rep. 242; Chit. on Con. 216–7; 3 Term Rep. 418; 1 Monr. Rep. 199; 3 Am. Com. L. Cases, 361]

COLLIER, C. J.—By the act of the 19th of December, 1837, it was provided that a board of commissioners to consist of three persons, should be elected, to be designated the board of Coosa river commissioners; who should, before entering upon the discharge of their duties, take and subscribe an oath, faithfully to discharge the duties of their office to the best of their skill and ability. The board were authorised to choose one of their number president, &c., to appoint agents, &c., with such compensation as they might consider just and reasonable; and for their services the commissioners were to receive the sum of four dollars per day. They were also vested with power to cause a survey to be made by an engineer, &c. of the Coosa, and an estimate of the probable cost of the removal of the impediments which obstruct its navigation for flat or keel boats descending at a low stage of water, from the head of the ten islands to the foot of the falls at the town of Wetumpka. *Further*, they were authorised to adopt the cheapest and most practicable plan of removing obstructions between the points mentioned, by letting the same to contract, in divisions or sections, to the lowest responsible bidder, after having given thirty days notice in the papers of Mobile, &c. This statute appropriated the sum of thirty thousand dollars for the purpose of carrying into effect the object of its enactment.—The subsequent act of the 1st of February, 1839, appropriated the further sum of thirty thousand dollars for the same purpose; both acts authorise the President of the Board to draw checks on the Cashier of the Bank of the State, in favor of any person to whom money may be due for work done, or service rendered under a contract with the board.

The question in this case is, can the president of the board of commissioners, elected by the legislature, and acting under the

authority of the statutes cited, associate himself with others, and make a contract with the board for the completion of the work, which they were authorised to let out and supervise? It may be laid down generally, that agents cannot at the same time take upon themselves incompatible duties and characters; or become actors in a transaction in which they have an adverse interest or employment. [Story's Ag. 11, 31–2.] This rule is founded upon the plain and obvious consideration, that the principal bargains for the exercise of the disinterested skill, diligence, and zeal of the agent for his exclusive benefit, in the business about which he is employed. "It is a confidence," says Mr Justice Story, "necessarily reposed in the agent, that he will act with a sole regard to the interest of his principal, as far as he lawfully may." Further, "it may be said with reference to christian morals, that no man can faithfully serve two masters, whose interests are in conflict. If then, the seller were permitted as the agent of another, to become the purchaser, his duty to his principal and his own interest, would stand in direct opposition to each other; and thus a temptation, perhaps in many cases, too strong for resistance by men of flexible morals, or hacknied in the common devices of worldly business, would be held out, which would betray them into gross misconduct, and even crime. It is to interpose a preventive check against such temptations and seductions, that a positive prohibition has been found to be the soundest policy, encouraged by the purest christianity." [Story's Ag. 199, 200.] So unyielding is the rule of law upon this point, that the inquiry is never permitted; whether the agent who has placed himself in an antagonistic position, has derived a profit from the bargain: Whether he has or not, it is equally without obligation to bind his principal. And whether he be a sole agent, or united with others, is alike unimportant. [Id. 201–2.]

It is insisted that the plaintiff is not entitled to recover, because the agreement between himself and the company, for an interest in the contract made by the lattter with the commissioners to remove obstructions to the navigation of the Coosa, was against public policy. There can be no question at the present day, that a contract opposed to the policy of the State is void, and will not be enforced by a court of justice. [Chitty on Con. 519, 4 Am. ed. and cases there cited; Carrington vs. Caller, 2 Stew't Rep. 175, and cases cited in my opinion, commencing at page 590;

Mitchell vs. Reynolds, 1 P. Wms. Rep. 181; Hunt vs. Knickerbocker, 5 Johns. Rep. 327; Wheeler vs. Russell, 17 Mass. Rep. 258; Patton vs. Nicholson, 3 Wheat. Rep. 204; Smith vs. Statesbury, 2 Burr. Rep. 924; Sanches vs. Davenport, 6 Mass. Rep. 261; Denny vs Lincoln, 5 Id. 386; Swayze vs. Hull, 3 Hals. Rep. 55.] In Mitchell vs. Smith, [1 Binn. Rep. 118,] it was held that where a statute inflicts a penalty, a prohibition is implied, and a contract relating to the offence is void, although it is not expressly so declared by the act. [Seidenbender vs. Charles, 4 Serg't & R. Rep. 159; Wilson vs. Spencer, 1 Rand. Rep. 76.] It is not necessary that a statute should impose a penalty for doing or omitting to do something, in order to make a contract void which is opposed to its operation; its policy may be violated, though it may contain no prohibitory terms, or be silent as to the consequence of a violation. [Sharp, et al. vs. Teese, 4 Hals. Rep, 352; Tuxberry vs. Miller, 19 Johns. Rep. 311; Myers vs. The State, 1 Conn. Rep. 502.] In Gulick vs. Baily, [5 Hals. Rep. 87,] it was decided, that forbearing to offer proposals to the Post Master General for carrying the mail on a certain route, was not a sufficient consideration to sustain a promise to pay money. That the policy of the act of Congress requiring the Post Master General to invite proposals, by public advertisement, is "to enlarge the number of offers, to increase the competition among persons disposed to contract, and thereby not only to secure to the United States faithful and capable carriers, but to procure the performance of this important public service in the best manner, and upon fair, just and reasonable terms." So, where it was agreed between the plaintiff and defendant, that the latter "should bid off the job" of making a road which "was set up at auction," and divide it with the former—in an action by the plaintiff to recover the value of his interest, it was determined, that the contract was *nudum pactum*, and a fraud on the vendor. [Wilbur vs. How, 8 Johns. Rep. 444.] The common law goes even beyond this, and is so solicitous to maintain its purity and dignity, that it declares invalid any contract which violates the precepts of religion, morality, or the rules of public decency. [Gibson v. Dickie, 3 M. & S. Rep. 463; Binnington v. Wallace, 4 B. & Ald. Rep. 650; Chitty on Con. 4 Am. ed. 513–4–5–6–7–8.] And an illegal contract cannot be enforced, although both parties stand *in pari delicto*. [Roby vs. West, et al. 4 N. Hamp.

Rep. 385; Springfield Bank vs. Merrick, 14 Mass. Rep. 322, and cases cited above.]

The true test by which it is ascertained whether a demand connected with an illegal transaction, is capable of being enforced at law, it is said, is, whether the plaintiff requires the aid of the illegal transaction, to establish his case. [Swan vs. Scott, 11 Serg't & R. Rep. 155; Simpson vs. Bloss, 7 Taunt. Rep. 246.] In Armstrong vs. Toler, [11 Wheat. Rep. 258,] the court say, where a contract grows immediately out of, and is connected with an illegal or immoral act, a court of justice will not lend its aid to enforce it. So if it be connected with the illegal consideration but in part, yet if it grow immediately out of it, though it be in fact a new contract, it is tainted with it.

So strongly disinclined is the law to countenance contracts opposed to sound policy and good morals, that it has been repeatedly held, that no action will lie at the suit of one *particeps criminis* against another, to recover a share of the money received on such a contract. [Belding vs. Pitkin, 2 Caine's Rep. 147, and cases cited in note *a;* Boyd vs. Barclay, 1 Ala. Rep. 34.]

We have thus carefully stated the principles and cited authorities applicable to the question we are considering, not because it was necessary to a decision of the case in hand, but merely to show that the law looks with detestation upon transactions founded in immorality: and to remove, to some extent, the vulgar prejudice against a science, which takes its origin from the *purest fountain of truth.*

Assuming that the witnesses whose testimony is recited in the record are worthy of credit, and making all inferences favorable to the plaintiff, that a jury could make, and it is difficult to conceive of a contract more palpably violative of public policy than that which the court is called on to enforce. The plaintiff, together with two others, is deputed by the State to perform a public trust, and to that end is authorised to enter into a contract to have certain work done at the lowest price; himself and associates are to supervise the work, and to pay for it, by checking upon the public funds, which were made subject to his order. He enters upon the discharge of the trust, lets out the work; but himself and one of his associates are interested in the contract, to the extent of one eighth each. Here is a striking departure from the line of duty; he had stipulated with the State and pledged

himself to exercise his "disinterested skill, diligence and zeal" for its "exclusive benefit in the business." His interest became adverse to that of the State whenever he assumed the two-fold character of contracting and being contracted with. He was required by the statutes under which he acted, to have the work *well done, and on the best terms;* yet he was interested in having it done in such manner, as was least expensive to the company with which he had associated, and most expensive to the State. His participation in the contract without the assent of the State, was a fraud no doubt, detrimental to its interests. The case itself shows, that so long as cupidity is an attribute of our nature, the State must be a sufferer in transactions with its citizens; unless the sentiment shall become universal, that good morals and justice require the same measure of integrity in public, as in private dealings. The truth of this remark is shown in the present case, by the association which was formed, and their *modus operandi.* Look at the manner in which the bids were made, ranging from $40,000 to near $60,000, with the understanding no doubt, that the lowest bids should be forfeited, and the highest secured.

If the plaintiff had been employed by an individual to perform a similar service, he doubtless never would have thought of being concerned in the contract; yet in such case he would only have abused the confidence, or disappointed the expectations of a single person. But here he was the agent of the entire people in their aggregate political capacity. The same rules apply to contracts with the public, as with individuals; and what would be a fraud or immoral, in the one case, is equally so in the other.—True, in the former, fraud is looked on with more indulgence, than in the latter, and the danger of detection is less. The principles of ethics may not at all times and by all people, be alike understood, yet the basis upon which they rest, know "no variableness, neither shadow of turning."

It is a misfortnne the sentiment should be so generally acted on, that it is allowable for all who will, to make the most they can of the State, either by overreaching its officers in a contract, or if more advantageous, tempting them to dishonesty and fraud—that a debt due the State is the last that should be paid—in fact, that it is permissible to avoid it altogether. This feeling is unpatriotic, destructive of virtuous principles, and calculated to bring discredit upon the country.

In the present case, the commissioners who participated in the contract, are not alone in fault; but the other members of the company are censurable for having associated with them; and if the State has been prejudiced by the connection, it may be, if there is no legal, that a moral obligation, at least, rests upon each of them, to repair the injury. But we have seen that the contract between the plaintiff and the company was against policy, whether the public interest suffered or not; and consequently, cannot be enforced. The view taken by the county court, is adverse to that we have expressed.

The judgment is therefore reversed, and the cause remanded.

MAY, ET AL. v. NABORS.

1. Where a bill single, not rendered negotiable by endorsement, is entrusted by the payee to an agent to collect, and he sells it for a fair and valuable consideration, to a third person, and he to another, who sues in the name of the payee, to his use, and obtains judgment, a court of equity will consider him a trustee for the payee, and compel him to account for the proceeds.

WRIT of Error to the Court of Chancery for Greene county.

The bill in this case was filed by Nabors against May and others, and alleges that in September, 1839, John P. Savage and Asa White executed to Nabors, a writing obligatory, for 166 dollars, payable to him sixty days after date. That in December of the same year, Nabors, then residing in Jefferson county, committed the writing obligatory to one W. H. Patterson for collection, and took his receipt. This recept describes the writing obligatory, and contains an agreement to collect or return it, reserving twenty-five dollars due from Nabors to Patterson. The bill further alleges, that Patterson afterwards transferred the writing obligatory to May, without the knowledge or consent of Nabors. That May early in 1840, commenced a suit on it in

the county court of Greene county, and recovered judgment against White, (Savage not being served with process,) in the name of Nabors, for the use of May. That Patterson left the State soon after the transfer of the paper to May, and is now residing in Texas, and is insolvent. That just before the exhibition of the bill, Nabors ascertained the fact of transfer to May, when he called upon him, showed him Patterson's receipt, and requested control of the judgment and collection of the money, which May refused.

The bill prays a decree that May surrender all control over the judgment and collection of the money to the complainant, and that the writing obligatory, if required by him, may be withdrawn from the files of the court, and for an injunction restraining May, his attorney, &c. from collecting the money.

The answer of May denies all knowledge of the transactions between Patterson and Nabors, except from information from the latter, and requires strict proof of all the allegations affecting his rights. It admits the suit and recovery of the judgment against White on the writing obligatory, in the name of Nabors for his use, and sets forth in detail, how he acquired possession of the paper, which was thus:

Early in 1849, one Jas Hatter of Greene county, residing about a mile distant from the residence of May, offered to trade the writing obligatory with him, and then informed May that he had received it from Patterson, who then was residing at Eutaw, in the same county, in payment for a quantity of corn delivered to Patterson. May agreed to give Hatter, for the bond, a quantity of corn, estimated at $110, a quantity of lumber and groceries worth $20 and to pay him $35 in cash, when the money should be collected on the bond making in all $166, provided he should be satisfied there were no offsets against it. Before receiving the bond, May went to Eutaw in company with Hatter, and called on Patterson for information with respect to the bond, and was assured by him that the paper was perfectly good, and that there were no offsets against it. May having no information or suspicion that Patterson had fraudulently or improperly sold the bond to Hatter, but believing Patterson had been fairly and honestly the owner of it, and also that he had sold to Hatter for a full, fair and valuable consideration, took it from him on the terms agreed on, and delivered the corn, lumber and groceries, and bound

himself to pay the remainder when collected. The evidence for the complainant established the receipt of Patterson; and that of the defendant May, very fully sustained his answer as to the sale of the bond by Patterson to Hatter, and by him to May.

The chancellor decreed in favor of the complainant, and awarded execution against May on a refunding bond executed by him with sureties, he having collected the money on the judgment, but directed the execution to be credited with 25 dollars and the accruing interest, that sum appearing from the receipt to be due from Nabors to Patterson, and which was to be retained by the latter out of the note when collected.

Murphy, for the plaintiff in error, insisted that the decree should have been in favor of May, inasmuch as Nabors had confided the bond to Patterson for collection, and thus enabled him to perpetrate a fraud upon Hatter, and through him upon May, who was an innocent purchaser for a fair consideration. It might also be considered as within the scope of Patterson's authority to trade off the note for its value in corn. Another feature in this case distinguished it from a mere case of agency.—Patterson had an actual interest in the bond for the amount due him from Nabors, and this circumstance would sustain a sale of it.

J. B. Clark, *contra*, was stopped by the court.

GOLDTHWAITE, J.—It is obvious, from the facts of this case, that a loss must fall on one of two innocent persons; but we entirely concur with the chancellor in the opinion, that the equities of these parties are by no means equal. It was apparent from the writing obligatory, that Nabors had never transferred the legal interest to any one, consequently, any person offering to deal for it, was necessarily put on the inquiry as to the right of the holder. Had the question been asked of Patterson, it is by no means improbable the defendant would, by his answer, have seen he was not authorised to dispose of it.

It is unnecessary to go into an examination of all the cases which could be collected on this subject, because the principle which must govern this case, has long since been settled with us. In Kirk vs. Glover, [5 S. & P. 340,] an attorney had taken a bill single in discharge of his client's judgment, and afterwards

traded it away without the knowledge of his principal. It was held that the principal could ratify the unauthorised act of the attorney in taking the bill single, and maintain trover against one to whom he had sold it. There, as here, there was an agency, but the act of the agent was without the scope of his power, and the purchaser was held responsible to the actual owner. The case of Gullet vs. Lewis, [3 Stewart, 23,] turned on a similar principle.

It has been supposed, the circumstance that the agent had an interest to a limited extent in the money to be collected, creates such a destruction as will sustain his unauthorised sale, but it is evident that no interest in the writing obligatory, was transferred, or intended to be transferred to him. His interest was not in the note, but in the collection of it. But if it was conceded that he had a partial interest in the note itself, the decision in Lucas vs. Kernodle, [2 Ala. Rep., N. S. 199,] settles that the equity could be reached, although the note was actually transferred.

Decree affirmed, with costs.

DAVIDSON & STRINGFELLOW v. SHIPMAN, ET ALS.

1. A former judgment is a bar only in reference to the subject matter of the suit, and the points there put in issue and determined. When, therefore, it is proposed to show, by the record of a judgment, that a certain matter was decided, it must appear from the record that such matter was in issue, and then parol evidence is admissible to show, that the matter, was, in fact, submitted to the jury. If the matter was not within the issue, such testimony is not admissible, as it would be, in effect, to contradict the record.
2. Upon the trial of the right of property, the issue being, that *the property levied on was, at the time of the levy, subject to the satisfaction of the execution*—it is not admissible to show, by parol, that the invalidity of the mortgage, under which the claimant deduced his title, was submitted to the jury.
3. Such an issue is an immaterial one, and no judgment should be rendered on the finding of the jury, but the court should award a re-pleader.

APPEAL from the Chancery Court of Tuskaloosa.

The bill was filed by the plaintiff in error, to foreclose a mortgage on slaves and other property, executed by Thomas Crawford on the 26th March, 1839, to secure them as his sureties upon two notes payable to the Branch Bank of Mobile, on the 1st of May, 1839 and 1840, amounting in the whole to $12,676 91. By the terms of the deed, the mortgagor was to remain in possession of the property until the mortgagees sustained loss or injury by reason of default of payment. That the mortgagor made default, and that on the 21st June, 1841, the plaintiffs in error paid the Bank $14,272 05, the amount due on the notes.

That in the mean time several persons had obtained judgments against Crawford, the mortgagor, individually, and as a member of a firm, and writs of *fieri facias* issued thereon, two of which in favor of Shipman, Crane & Co., being the judgments first obtained, were levied on the mortgaged property on the 17th February, 1841, and the residue on the 11th April, 1841.

To the property first levied on, the complainant Davidson, individually interposed a claim under the statute on the 17th Feb. 1841. At the trial of the right of property came on at the succeeding April term of the circuit court; that on the trial the court excluded the mortgage as evidence, on the ground, 1st, that but one of the mortgagees interposed a claim, and secondly, that the contingency upon which the mortgagees were entitled to the possession of the property, had not happened—and that the jury rendered a verdict subjecting the property to the payment of the executions.

To the property levied on under the remaining executions, the complainants jointly, on the 1st July, 1841, interposed a claim, which, at the succeeding term of the court, resulted in the condemnation of the property to satisfy the executions; that on the trial of the issue, the plaintiffs in execution objected to the admission of the mortgage in evidence, but the court permitted it to be read, and the plaintiffs excepted; that complainants are unable to say on what ground the jury decided, but that as the mortgagor was in possession at the time of the levy under the issue joined, no other decision could be made, as the statute prohibited them from dismissing or discontinuing their claim. That the entire mortgaged property is not sufficient to satisfy the executions, and the mortgagor is insolvent; that if the property is sold under the

executions, it may be carried abroad and dispersed, &c. The prayer was for an injunction, &c.

The defendants, by their answers, rely on the trials at law, upon which they insist the main question in issue before the jury was, whether the deed of mortgage was *bona fide*, or fraudulent and void.

A great amount of testimony was taken to prove what transpired at the trials, and among others, that of the Judge who tried the cause, who states that the main question on the trial before the jury was, as to the validity of the mortgage; that the plaintiff objected to its going to the jury on the ground, that on its face it was fraudulent and void as to creditors; but it was permitted to be read in evidence. That evidence was introduced on both sides, one party endeavoring to prove it fraudulent, and the other, that the deed and the whole transaction connected with it, was fair and *bona fide*. That he charged the jury, that the main question was, whether the mortgage was fair and *bona fide*, and supported by a good consideration, or whether it was fraudulent and intended to defeat creditors—that he stated the badges of frauds, &c. He does not recollect all the charges given.

One of the counsel for the plaintiffs states the same in substance as the Judge, as to what took place on the trial, and in addition, that no point or objection was made as to the frame of the issue.

One of the counsel for the claimant proved, that the Judge, in addition to charging on the question of fraud, told the jury that the possessory interest of Crawford, the mortgagor, was subject to sale under execution, and has no recollection that any testimony was offered to impeach the transaction as fraudulent. Another of their counsel testified, that the fact that the property was in possession of the mortgagor, was relied on by the plaintiff's counsel, and charged on by the court. Much other testimony was taken to prove what took place on the trial of the cause.

The mortgagors took possession of the slaves about the last of June, 1841. It also appears from the proof, that the complainants paid the debt, to secure them from which the mortgage was made.

The chancellor considering, that from the decisions of this court, the validity of the mortgage was involved in the issue sub-

mitted to the jury, that their finding was conclusive against the complainants, and dismissed the bill.

The dismissal of the bill is now assigned for error.

Crabb & Cochran, for plaintiffs in error, made the following points:

1. The only right in the mortgagor (defendant in execution) subject to levy and sale, was the possession of the mortgagor, which he legally had at the time; the right of the complainants being then a mere equity. [3 S. & P. 397; 5 ib. 192; 5 Porter, 182.] Such being the case, the verdict and judgment was a condemnation of the interest only of the defendants in execution, and did not affect the equity of plaintiffs in error. Such would be the law if the ordinary issue had been tried, but in this case, the issue was special, and confined the jury to the *time of the levy.*

2. The omission to set up an equitable defence in a suit at law, or an unsuccessful attempt where no defence can be made, will not preclude a party from relief in chancery. [1 W. C. C. R. 320; 3 Ala. 406; 2 Leigh, 474; 1 Dana, 99, 109; 3 Stewart, 9, 155; 1 S. & P. 135; 5 Porter, 547; 4 Litt. 159; 3 Dess. 323; 1 Car. Law R. 534; Cook's R. 36, id. 242.]

3. Or when defence at law is doubtful, and the jurisdiction of chancery undoubted. [17 Johns. 384; 3 Caines' C. 1; 10 Johnson, 587.]

4. At the time the claim was interposed, as the debt was not paid, the right was purely equitable.

5. A judgment of a court of concurrent jurisdiction is conclusive only as between the same parties and privies upon the same subject matter directly in question in another court; but not if it comes collaterally in question, or is incidentally cognizable, or only inferrable by argument from the judgment. [Duchess of Kingston's case, 20 State Trials, 538; 1 Starkie Ev. 190, 201, § 59, 65.] In this suit the object is different from that at law—the subject matter is different—the parties are different. The question of fraud was at most, a mere incidental or collateral question in the court; it was a matter of inference; but to be an estoppel, it must appear from the record to be the same. [4 Conn. 276; 10 Wend. 80; 3 East 346; 1 Esp. R. 43; 2 Johns. 24; 4 Day, 274, 431; 5 Conn. 127; Greenleaf's Ev. 572; 13 Wend. 419.]

6. To be an estoppel, it must be mutual, but if the plaintiffs in

execution had filed a bill to redeem, the judgment at law if against them, would not have precluded them from insisting on the fraud, if it existed. [1 Pain's R. 525, Greenl. Ev. 563.]

7. As to the judgments in favor of Shipman, Crane & Co. there can be no pretence that the question of fraud has been tried.

8. Lastly, as creditors of Crawford individually, they are entitled in equity to satisfaction out of his estate in preference to the creditors of the firm of Crawford & Hines. [1 Story's Eq. 627, 75; 17 Vesey, 205; 5 Cranch 34.]

Peck & Clark, for defendants in error.—The finding by the jury on the trial of the right of property where the issue is general, is conclusive between the parties to it, as has been repeatedly held by this court, and is a condemnation of the property, absolutely, in discharge of the execution. [5 Porter, 182; 6 ib. 447; 2 Ala. Rep. 314.]

As between these parties, the question is *res judicata*, not only as to those questions which were in point of fact adjudged by the court, but is alike decisive upon all points that were in issue and properly determinable. [9 Porter, 351.] In all cases where the claimant relies upon a deed as the foundation of his claim, the validity of the deed is necessarily put in issue, and must be adjudicated.

But upon these trials, except those upon the executions of Shipman, Crane & Co., the question of the validity of the mortgage deed, was in fact passed upon by the jury, under the charge of the court, as is shown by the testimony. The question, therefore, argued by the opposite counsel, founded upon the language in which the issue is couched, has no application. The *forum* in which to litigate their rights was selected by themselves—the issue was made up under the direction of the court, as the statute requires, without objection from them, and they were permitted under it to litigate the question of *fraud vel non*, and upon the best established principles of law, the judgment is binding on all courts of concurrent jurisdiction.

As to the cases of Shipman & Co. in which the deed, on the motion of the plaintiffs, was excluded from the jury, the plaintiff in error is in no better condition. If the court erred in excluding the deed, the party complaining of it should have taken advantage of it on error; it cannot be redressed in chancery. But the

plaintiff holds the affirmative of the issue, and must have proved that the property was liable to his execution, otherwise he could not have obtained judgment of condemnation.

If the defendants in error have, as is alleged, obtained an advantage over their adversaries, it was not unfairly obtained, nor was it the result of fraud, accident or mistake, in the legal sense of the term, and therefore a court of chancery has no power to deprive them of it.

ORMOND, J.—It is the settled law of this court, that the possessory interest of a mortgagor, or of the maker of a deed of trust, may be sold under execution, and by a purchase at such sale, the purchaser acquires such an interest only as the defendant in execution has in the property. In this there is no difficulty, as no one claiming title to, or an interest in the property, would be concluded thereby. But when a claim is improperly interposed, as by a mortgagee, when the law day has not arrived, many embarrassing questions arise—for as the plaintiff in execution has an undoubted right to attack the validity of the deed, or impeach it for fraud, it becomes difficult, if not impossible, to determine, after a verdict in favor of the plaintiff in execution, whether the entire property, or only the possessory interest of the defendant in execution, was condemned by the jury.

To avoid this difficulty, this court intimated, in Perkins & Elliott v. Mayfield, [5 Porter, 193,] "that the issue should always conform to the nature of the interest sought to be subjected, if an equity of redemption, it should be so expressed—and if there is no qualification, it must be supposed to be the entire interest which is proceeded against." This rule was found to be impracticable, and that there was no middle ground, but to proceed against the interest of the defendant in execution, whatever that was. Finally, in The Planters and Merchants Bank of Mobile v. Willis & Co. [5 Ala. 770,] it was held that the only proper issue was, that "*the property levied on was* subject to the execution." And in Williams & Battle v. Jones, [2 Ala. 319,] it was suggested that where the mortgagee or trustee could not interpose a claim in consequence of the right of the defendant in execution to the possession, that a court of chancery would interfere and ascertain the interest of the defendant in execution subject to sale.

The executions of Shipman, Crane & Co. were levied on the mortgaged property, whilst the defendant in execution, by the terms of the deed, was entitled to the possession of the property, and whilst that state of things continued, the mortgagees interposed a claim under the statute. At the trial, the court very properly excluded the mortgage, and the property was condemned to the satisfaction of the executions.

Various other judgments being obtained against the mortgagor, executions issued thereon against him, and with those of Shipman, Crane & Co. were on the 11th April, 1841, and whilst the mortgagor was entitled to the possession of the mortgaged property, levied thereon. About the 21st June, 1841, the mortgagees having paid the debt for which they were sureties, and to secure which the mortgaged deed was made, they subsequently, on the 1st July, 1841, interposed a claim for trial of the right of property.

The cases of Shipman, Crane & Co. were dismissed in consequence of the previous trial, and judgment in their favor. The other cases were tried upon an issue, that the property levied on by the execution, was at the time of the levy, to wit, on the 11th April, 1841, liable to the satisfaction of the plaintiff's execution. The jury under this issue found in favor of the plaintiff in execution, and condemned the slaves levied on to the payment of the debts, and the question to be determined is, whether the verdict and judgment is conclusive against the validity of the deed.

The general rule of the conclusiveness of judgments, is the one laid down by Chief Justice DeGrey, in the Duchess of Kingston's case. "That the judgment of a court of concurrent jurisdiction directly upon the point, is as a plea, a bar, or as evidence conclusive, between the same parties, upon the same matter directly in question in another court." This celebrated judgment has been ever since recognized in England and the U. States as a correct exposition of the rule. Some difficulty has, however, been found to exist, and some discrepancies will be discovered upon an examination of the numerous cases on this question as to the mode of ascertaining what was the point in issue between the parties, and whether proof *aliunde* for that purpose is admissible, or whether the point must not appear from the record. [See the numerous cases on this head collected, and arranged by Cowen and Hill, 3 vol. Phil. Ev. 826, 848.]

Necessarily, parol evidence must be admitted to identify the subject matter of the suit. "Every fact which exists on record, must be proved by the record, but when the question is as to the real subject matter of the suit, or to show a bar to another suit, the identity of the cause of action may be proved by other than record evidence. [Parker v. Thompson, 3 Pick. See also Cist v. Zeigler, 16 S. & R. 282; Robinson v. Windham, 9 Porter, 397.]

A former judgment is a bar only in reference to the subject matter of the suit, and the points there put in issue and determined; where, therefore, it is proposed to show, by the record of a judgment, that a certain matter was decided, it must appear from the record, that such matter was in issue, and then parol testimony may be admitted to show that the matter was in fact submitted to the jury. If the matter was not within the issue, such testimony is not admissible, as it would be, in effect, to contradict the record. [Manny v. Harris, 2 Johns. 24; Gardner v. Buckbee, 3 Cow. 120; Burt v. Sternburg, 4 Cow. 559; Wood v. Jackson, 8 Wend. 9.] There are, however, numerous adjudications by courts of the highest respectability, which hold a much more restricted doctrine, and assert that it must appear from the record itself, that the matter again sought to be brought in question, was directly in issue in the former suit, and that parol testimony in aid of the record, is inadmissible. [Sintzeninck v. Lucas, 1 Esp. 43; Church v. Leavenworth, 4 Day, 274; Smith v. Sherwood, 4 Conn. 276.]

Admitting, then, as it seems to be the more reasonable doctrine, and better adapted to the proper administration of justice, that parol evidence is admissible to prove that a particular matter was, in fact, submitted to the jury, and passed on by it—such matter being in issue—the question here is, what was put in issue by the pleadings, and therefore, proper to be passed upon by the jury? It was not that the property levied on was liable to the execution of the plaintiff, in which event, as has been previously shown, the validity of the deed would have been directly put in issue; but it was, that, *when the levy was made*, the property was subject to the satisfaction of the execution. Now, it is most obvious, that the question here presented for the determination of the jury, did not involve the validity of the mortgage. On the contrary, it admits, by implication, its binding force. Such being the state of the case, it was inadmissible to prove, by evidence

aliunde. that the validity of the mortgage was passed on by the jury. It is very clearly proved, that the validity of the mortgage was contested before the jury; but who can undertake to say its invalidity was found by the jury. It was not necessary that they should pass upon it; and, therefore, *non constat*, that they did pass upon it. There would be no security whatever for private rights, if an *estoppel* could thus be created by parol testimony not warranted by the record.

In this case, it appears that, when the levy was made, the defendant in execution had such an interest in the property as could have been seized and sold by the sheriff, but that this possessory interest had ceased to exist when the claim was interposed. From that time the possession, or, at least, the right to the possession, was vested in the mortgagees; and their demand of the sheriff put an end to his right to retain the slaves. [Magee v. Carpenter, 4 Ala. 475.] It results from this, necessarily, that the only proper issue to be tried was, the validity of the mortgage; and that the issue which was tried, was wholly immaterial, and did not warrant the court in rendering judgment upon it; but that it should have awarded a repleader. [Bennet v. Holbeck, 3 Saunders, 318, note 6.]

These views are decisive of the case. The defendants do not attempt to invalidate the mortgage for fraud, except so far as the complainants were supposed to be concluded on that point by the verdict of the jury; and it is but justice to the chancellor to add, that his opinion coincided with those here expressed; but he yielded his own opinion to the decision of this court in the late case of the Planters' and M. Bank v. Willis & Co. [5 Ala. Rep.] In so doing, he gave to that decision an effect not intended by this court. All that we meant to determine was, that, upon the proper issue, whether before or after the law day had arrived, a verdict by the jury against the claimant would be conclusive of his rights under the deed.

This court has undoubtedly the power to proceed and render a decree in this case; but as the court of chancery would have had the power, in its discretion, to permit an amendment of the answer, so as to raise the question of fraud in fact, we think it proper to remand the cause for further proceedings; but as both parties appear to be equally in fault, this is not considered a proper case for costs; each party will, therefore, pay his own costs in this court.

JUDGE OF BENTON COUNTY COURT, USE, &C. V. PRICE, ET AL.

1. An administrator, *de bonis non*, cannot cause his predecessor and sureties to be sued upon the administration bond executed by them, where no judgment or decree has been obtained against the principal therein, for the breach of his duty as administrator.

WRIT of error to the Circuit Court of Benton.

This was an action of debt, at the suit of the plaintiff in error, against the defendants. The suit was brought for the use of James L. Simmons, administrator *de bonis non*, with the will annexed, of Wm. Burns, deceased, against Wm. C. Price, the late sheriff of Benton, and, *ex officio*, the predecessor of Simmons in the administration of Burns' estate, and Thomas R. Williams and Isaac Haynes, his sureties in the bond, which he had executed for the faithful performance of his official duties.

The declaration alleges, that, on the 14th of January, 1842, the grant of administration to Price was revoked, and on the same day, letters of administration were regularly granted by the orphans' court of Benton to Simmons, the real plaintiff; that the administrator *de bonis non* has made a special demand of his predecessor of the assets, &c., unadministered; and that he has failed and refused to deliver up and hand over the same. It is averred, that Price has converted the estate of the decedent, of the value of four thousand dollars. Many special breaches of the defendants' bond are stated, which need not be here particularly noticed. The defendants demurred to the declaration, and their demurrer being sustained, a judgment was rendered against the plaintiff.

S. F. RICE, for the plaintiff in error.
WM. B. MARTIN and T. A. WALKER, for the defendants.

COLLIER, C. J.—The question presented for the consideration of this court, is, whether the plaintiff's action can be maintained? It is said that an administrator *de bonis non* is entitled

to all the assets which remain in specie, and were not administered by the first executor, or administrator. [3 Bac. Ab. 19, 20, 1 Lomax's Ex'rs. 336.] But if the property, in any of the effects of the deceased, have been changed by the original executor or administrator, and have vested in him in his individual capacity, they cannot be recovered by an administrator *de bonis non.* [Ibid. Dodson v. Simpson, 2 Rand. Rep. 294.] So, if the previous administrator have wasted or converted the estate, his representatives cannot be called to an account by his successors in the administration. [1 Lomax's Ex'rs. 337–8; Wernic v. McMurdo, 5 Rand. Rep. 51 ; Hagthorp v. Hook, 1 G. & Johns. Rep. 270 ; Cheatham v. Burfoot, 9 Leigh's Rep. 580; 2 Porter's Rep. 550·]

In the case of the Judge of the Madison county court v. Looney, et al., [2 Stewt. & P. Rep. 70,] an action of debt was brought in the name of the judge, the obligee of the bond, against an executor and his sureties. The breaches assigned were : the failure of the executor to return an inventory and appraisement ; an account of sales ; to make settlement of the affairs of the estate ; or to pay the persons, for whose use the suit was brought, a legacy, which it was the object of the action to recover. A demurrer to the declaration was sustained upon the ground, that the suit upon the bond was not maintainable, until the amount claimed was ascertained by a settlement in the county court or otherwise. [See, also, The Ordinary v. Williams and Parkman, et al, 1 Nott & McC. Rep. 587; The Ordinary v. Powers, 2 Id. 213.] The case of the Judge of the Limestone county court v. French, [3 Stewt. & P. Rep. 263,] was an action against one of the sureties in an executor's bond, to recover a distributive share of the testator's estate. The order of the orphans' court professed to be a final settlement with the executor, ascertained the amount due each distributee, and the number of them, but did not state their names, or render a decree, either joint or several, in their favor. The court was of opinion, that a decree of the orphans' court, upon the final settement of the accounts of an executor or administrator, would support an action against his sureties in the bond, if the money could not be collected of their principal. But it was held, that, as the settlement was not followed by an order against the executor for the payment of the money, it did not authorize a suit against his sureties. In the Judge of

the Limestone county court v. Coalter, et al., [Id. 348,] it was decided, that, before suit can be brought on the bond, assets must be fixed in the hands of the executor, and the inability to make the money out of him, must be established: that the order of the judge of the county court to pay a specific sum to a distributee, is tantamount to a judgment of *devastavit*, and sufficiently establishes the fact of assets being in the hands of the executor or administrator. If, in such case, execution had been sued out, and returned *nulla bona*, it would have shown the default of the executor, and authorized a suit against the sureties on the bond. [See Faulk v. The Judge of Monroe County Court, 2 Porter's Rep. 538; Thompson, Judge, &c., v. Searcy and Fearn, 6 Porter's Rep. 393; Coney v. Williams, et al., 9 Mass. Rep. 114; Stewart v. Treasurer of Champaign County, 4 Ohio Rep. 98; Jones v. Anderson, 4 McC. Rep. 113.]

In the goods of Hall, [1 Hagg. Rep. 139,] an action at common law being brought in the Archbishop's name, by the administrator *de bonis non*, against the executor of the original administrator, for the balance of the intestate's estate, the ecclesiastical court directed the bond to be attended with, on the trial at law, security being given to indemnify the Archbishop against costs. There, the suit was brought against the executor of the administrator alone, without joining the sureties of the latter, and the decision of the court went only to the extent we have stated. Whether the condition of the administration bond, under the 22 & 23 Chas. II. c. 10, s. 1, subjects the obligor to an action where none can be maintained here, we will not stop to inquire. It may, however, be remarked, that the condition defines the duties required with some degree of particularity, and that the case cited, is the only adjudication we can find touching the right of the administrator *de bonis non* to put the bond in suit against his predecessor, before he has recovered a judgment against him. [1 Lomax's Ex'rs. 338; 1 Williams' Ex'rs. 334.]

By a statute passed in 1806, it is enacted that, "if it appear upon examination that any administrator hath embezzled, wasted or misapplied all, or any part of the decedent's estate, or shall refuse or neglect to give bond, with security as aforesaid, the said (orphans') court may forthwith revoke or repeal the letters of administration; and thereupon grant letters of administration to such other person or persons, having a right thereto, as will give

bond in manner and form aforesaid; who may have actions of trover, detinue, account, and on the case, for such goods or chattels as came to the possession of the former administrator, and were withheld, wasted, embezzled, detained, or misapplied by any of them, and no satisfaction made for the same." [Clay's Dig. 221, § 4.] This act, it is true, gives to the administrator *de bonis non* a remedy in some cases, in which he had none at the common law; but it does not authorize the bond to be put in suit; it merely gives an action against the original representative for the detention, wasting, embezzlement or misapplication of the goods and chattels of the intestate that have come to his hands. We have seen that neither of the actions provided by the statute, or any other, would lie where the assets of the estate had been wasted, or converted; and the act only applies where letters of administration have been revoked and granted to another for either of the causes mentioned in it.

Whether it would not be competent, in the absence of any express legislation upon the subject, for the administrator *de bonis non* to cause the bond to be sued on against the first administrator *alone*, and to allege as a breach, a refusal to deliver over the goods that remain in his hands unadministered, we will not, as it is unnecessary, undertake to determine. It may be questionable whether such an action can be maintained, even where letters of administration have been revoked for the causes mentioned in the statute, where the assets have been wasted or converted; but be this as it may, it is perfectly clear upon the authorities cited that the sureties cannot be sued, either jointly or alone, until a judgment or decree has been first obtained against their principal, and an execution issued thereon, prove to be unproductive.

Without undertaking to consider any particular objection to the declaration, we are brought to the conclusion that the action cannot be sustained; the judgment of the circuit court is consequently affirmed.

CROOM v. DAVIS, ET AL.

1. A court of equity has no jurisdiction to relieve a debtor from applying for his discharge, under the act to abolish imprisonment for debt, on the ground that he has removed his property from this to another State to avoid paying his creditor. The right to a discharge is a legal question with which a court of equity has nothing to do.
2. When a debtor applies to be discharged, under the act abolishing imprisonment for debt, and his schedule shows that he has property in another State, he is not compelled to bring it into the jurisdiction of this, as a condition of his discharge.

WRIT of Error to the Court of Chancery of the 3d District of the Southern Division.

The case made by the bill is this:

Croom had sued out bailable process against Davis, for a debt of 1500 dollars or more, by reason of which he was arrested; and in order to discharge himself from custody, applied to a justice of the peace, to obtain the benefit of the act to abolish imprisonment for debt, by filing a schedule of his estate. His schedule enumerates some articles of personal property of small value, as being in Sumter county in this State, and 14 slaves, 3 horses and 1 mule, as being in the State of Mississippi; also, 320 acres of land in Sumter county. The bill charges, that Davis has no title, legal or equitable to the land; that the personal estate in Sumter county is of value scarcely sufficient to pay the expenses of getting and selling; and that the slaves, horses and mule were run off from this State by him, to avoid the payment of the debt due to the complainant, and other debts. That the schedule, although it may be, in point of fact, so that the complainant cannot controvert it by saying he believes it to be untrue, is, nevertheless, when coupled with the removal of the property out of this State, a fraudulent evasion of the act referred to.

The bill prays, that the sheriff of Sumter county may be restrained from discharging Davis from custody, without his delivery of the slaves, horses and mule; and, also, that Davis may be restrained from availing himself of his application for discharge, until he surrenders the same property.

The injunction was granted by the register of the court; but afterwards, on motion of the defendant, the bill was dismissed for want of equity.

SMITH, for the plaintiff in error, urged, that a court of chancery must have jurisdiction of the case made by the bill, otherwise a gross evasion of the act abolishing imprisonment for debt, [Clay's Digest 70,] must be tolerated.

INGE, *contra*, insisted, that there was no evasion, by the defendant, Davis, of the act referred to; the case made by the bill, is one which is not covered by the statutes; and is an attempt to create a remedy where none has been given by law.

GOLDTHWAITE, J.—The case made by the complainant's bill, is that of a debtor removing his property from the State for the purpose of avoiding the payment to his credior; and the question to be examined is, whether a debtor, on this condition, can be restrained from availing himself of his application to be discharged from arrest, under the act abolishing imprisonment for debt.

The bill, in effect, concedes that the creditor cannot prevent the debtor's discharge by resorting to any of the modes given by the act itself, and relief in equity is asked under the impression that the debtor is required by good conscience to bring the property, enumerated in his schedule, within the jurisdiction of the State, the more especially when that property has been carried from it.

The statement of this case would seem almost to prove that this is a matter to be determined by the court, acting upon the application for the discharge from arrest—for what aid can be expected from a court of equity in restraining a party from pursuing a remedy to which he is entitled at law? He either has the right to be discharged, or has not the right; but the court to which he applies, must make the decision, and we are not aware of any course of practice which will authorize the interference of a court of equity.

But, as it may not be satisfactory merely to decide that the bill was properly dismissed, because containing no ground for equitable interposition, we shall proceed to give our reasons for

supposing that the debtor's discharge could not be prevented by his omission to bring the property, enumerated in his schedule, within the jurisdiction of the State. We recently had occasion, in the case of Wade v. Judge, [January Term, 1843,] to give a construction to the act abolishing imprisonment for debt, [Clay's Digest 70,] and then held, that it was to be construed *in pari materia* with the several acts for the relief of insolvent debtors, it forming a part of the same system of laws. We also collated the several statutes, and shewed that the schedule operated as a transfer of the property within the State; that with respect to money, choses in action, or other property, which might be in the debtor's immediate possession, that is, about his person, or near at hand, it would be competent for the court to direct such should be delivered previous to the discharge becoming effectual; but we declined to consider how far that would operate on property, real or personal, of the debtor without the State.

It is scarcely possible, if it had been intended that a debtor should not be discharged when he owned property without the State, unless he procured it to be brought within it, that such intention should not have been expressed, and the necessary distinction made with respect to lands which the debtor might hold elsewhere. Independent of the entire silence of the statutes, there are some enactments which seem to indicate that the legislation was intended to operate only on property within the State. Thus the act of 1807, [Clay's Digest, 274, § 3,] provides, that all the estate discovered by the prisoner, shall be vested in the sheriff of the county where the lands, tenements, goods or chattels shall be found. The same act [§ 4] also provides for the issuing of garnishee process to persons owing the debtor, or having effects of his in their possession. The act of 1824, [Clay's Digest, 278, § 19,] directs that, in cases where insolvents have been heretofore discharged, and no proceedings have been had to collect the debts, &c., and the schedules have been returned to the clerk of the county court, the judge shall appoint one or more commissioners to collect and recover the debts, property and estate due such insolvents.

That the authority conferred by these enactments can only be exercised within the State, is evident from the terms used; and it might well be questioned, if legislation had been attempted to af-

fect property in other States, how far such legislation would be effectual.

Are we then authorized to presume it was intended by our Legislature to prevent a debtor's discharge, unless he brings within the jurisdiction of this State property held by him in another? We have already shown such a presumption is not warranted by the language used; and that the contrary presumption may be inferred. It might also be urged, that, to require it, would not be consistent with the spirit of our laws, which inflict imprisonment only as a punishment for fraud. Independent of statutory enactment, there seems to be no reasons which require the debtor should be forced by imprisonment to bring his property within this State, because his creditor has chosen to pursue him here. In addition to this, the property might be subjected to damage and expense by the removal; or it might be charged in execution or attachment, after rendering the schedule, and before the debtor could remove it.

Doubtless the debtor, who removes his property to avoid his creditor, is entitled to little commiseration, but if his schedule is made in conformity to the statute, and is not controverted by the creditor, the mere fact that he has removed his property to another State to avoid the debt, will not be sufficient to prevent his discharge. Until the removal of property with such intent is made illegal or criminal, a court of equity is powerless to aid the creditor beyond the provisions of the existing laws.

Decree affirmed, with costs.

HALL v. HILLIARD.

1. An order cannot be made in vacation, at the instance of a stranger to the judgment, to arrest the execution of a writ of *habere facias possessionem*, although, after its execution, if improperly turned out of possession, he may, in certain cases, on motion to the Court, be restored to the possession.

ERROR to the Circuit Court of Mobile.

This was a petition by the plaintiff in error to the Judge of the sixth judicial circuit, praying an order to restrain the sheriff from executing a writ of *habere facias possessionem* which had issued upon a judgment to which he was not a party. The Judge granted the order in vacation, and at the return term of the writ, on motion of the plaintiffs in the judgment, quashed the order so made. From this judgment, this writ is prosecuted by the petitioner, who assigns for error the judgment of the court, quashing the restraining order.

CAMPBELL, for plaintiff in error.
ADAMS and J. GAYLE, *contra.*

The cause was submitted without argument.

ORMOND, J.—In the case of Howard and Holman v. Kennedy's ex'rs, [4 Ala. Rep. 592,] this court held that it was competent for a court which had rendered a judgment in ejectment, to set aside the writ of *habere facias possessionem*, after it had been executed at the instance of a stranger, not in privity with the defendant, and having *prima facie*, a valid title to the premises from which he had been ejected. The ground of that decision was, that one was turned out of a possession *prima facie*, valid by the process of the court issuing upon a judgment, to which he was not a party, and of which he had no notice, and therefore no opportunity to defend against, and might sustain irreparable injury, if the court did not interpose in this summary mode, and prevent the abuse of its process.

In the present case, the application is not to restore the party to a possession of which he has been improperly deprived, through the medium of the process of the court, but is an effort by a stranger to the judgment, to restrain the sheriff from executing the process which has regularly issued upon it.

This application appears to us entirely novel—our researches have not enabled us to find any case in which it has been allowed; and its allowance appears to us to be pregnant with so much mischief, and the practice to be so liable to abuse, that we are unwilling to set the precedent.

Upon a motion, by a stranger to the judgment, to vacate the writ of possession executed, the title under which he claims the extraordinary interposition of the court, is open to be controverted, and he must make out, to the satisfaction of the court, on notice to the plaintiff in the ejectment, at least a *prima facie* title, which the plaintiff did not controvert on oath. For, if the facts upon which the relief was sought were contested, it would not be proper that the court should act in this summary way, but should leave the party as in other cases, to seek redress in the usual mode.

But, if the application could be made *ex parte*, by a stranger to the judgment, to prevent the execution of the process of the court, the interposition of the court would be frequently obtained on partial or incorrect statements of the facts; and it is not difficult to foresee, that the most mischievous consequences would result from the obstruction which would be interposed to the execution of legal process.

Nor is any such extraordinary remedy necessary to the protection of our citizens. The sheriff is a responsible officer, and acts at his peril, if he exceeds his authority, and as has been shown, if one not a party to the suit, is prejudiced, he may in a proper case, be summarily restored to his rights. Further protection than this cannot be granted without danger of improper interference with the rights of the plaintiff.

From what has been stated, it follows that the Judge should not have granted the prayer of the petition, and by consequence, did not err in quashing the order improvidently made upon it.

Let the judgment be affirmed.

RIVES & OWEN v. WILBORNE.

1. Where the affidavit of the claimant of property levied on by execution, describes the execution, the property levied on, and when, and asserts that the right thereto is in the claimant, this is a sufficient compliance with the statute, although

the affidavit is dated on the day the sheriff's indorsement shows the execution was placed in his hands, and four days before the same was levied.

2. Where personal property is levied on by attachment, and a replevy bond executed, conditioned to have the same forthcoming to abide such judgment as may be rendered in the cause, the property cannot be levied on by an execution, the lien of which is not paramount, until it is discharged from all liability to satisfy the attachment on the judgment therein.

WRIT of Error to the Circuit Court of Sumter.

This was a trial of the right of property under the statute, in which the plaintiffs in error were the plaintiffs in execution, and the defendant the claimant. The material facts of the cause, as well as the questions of law proposed to be revised, are shewn by a bill of exceptions sealed at the instance of the plaintiffs. 1. The plaintiffs moved the circuit court to dismiss the claim on the ground that the affidavit made by the claimant was insufficient. It was verified before a justice of the peace, who attests it as of the 22d February, 1841, and it affirms that "two negroes, namely, one negro man by the name of Alfred, aged about twenty-five years, and one negro boy named Bill, aged about fifteen years, levied on as the property of Richard Wilborne, by virtue of two executions, one in favor of James Rhodes and the other in favor of Rives and Owen, that issued from the county court of Sumter county, in February, 1841, is his, the deponent's, own right and property." The motion to dismiss was overruled; and thereupon, an issue was made up under the direction of the court, and submitted to the jury, to determine whether the slave, "Bill," was subject to the plaintiff's execution. 2. On the trial, the plaintiffs called a witness, who proved that the slave in question was in the possession of the defendant in execution, at the time he was levied on. The claimant then produced three writs of attachment against the estate of the defendant in execution, issued on the 6th and 9th days of May, and the 11th of June, in the year 1840, returnable to the term of the county court of Sumter, then next succeeding, all of which were regularly levied, previous to their return, on the slave "Bill." He also introduced a replevy bond, in one of the attachments, and proved that the claimant was the defendant's surety therein, for the replevy of the slaves. The plaintiff's execution was subsequently levied. Judgments were rendered in the suits commenced by attachment, on the 8th day

of Frbruary, 1841. Thereupon, the claimant prayed the court to charge the jury, that the slave, Bill, when levied on, was in the custody of the law, by virtue of the levy of the attachments, and the proceedings thereon; and consequently, was not subject to the levy of the execution when made; this charge was given in the terms in which it was asked.

The questions now raised are, 1. Should the motion to dismiss the claim of property, have been sustained? 2. Was the charge of the court to the jury, correct?

MURPHY, for the plaintiffs in error, cited to the second point, Hagan v. Lucas, 10 Peter's Rep. 400; Pond v. Griffin, 1 Ala. Rep. N. S. 678.

BLISS and BALDWIN, for the defendant, relied upon Dunklee v. Fales, [5 N. Hamp. Rep. 527,] to show, that by the return of the slave to the defendant, after his seizure under the attachments, he became subject to the execution.

COLLIER, C. J.—The act of 1812, enacts, that when property levied on by execution shall be claimed by any person, not a party thereto, such person may make oath to such property, &c. The oath of the claimant, it is believed, conforms very fully to the statute—it describes the execution, the property levied on, and when, and asserts that the right thereto is in the claimant. The transcript of the execution, which we find in the record, is indorsed by the sheriff, received the 22d, and levied the 26th February, 1841, while the affidavit appears to have been made on the day of its reception. This discrepancy we do not regard as at all material, and if necessary, would intend that the sheriff was mistaken in the date of his levy, or the justice of the peace, in the day on which the affidavit was verified; the former is perhaps the most reasonable inference, as the condition of the claimant's bond recites the levy as having been made on the day the execution was received.

2. In respect to the second point, it has been heretofore decided, that the levy of an attachment, gives a lien to the debtor upon the property seized, and that the lien thus acquired, is not lost by the defendant's entering into the usual replevy bond, with sureties: *Further*., that before the forfeiture of the bond, the es-

tate attached, can neither be sold or levied on, by another attachment. or execution: That the property is at the risk of the debtor, and his sureties, pending the suit, and no principle, will tolerate any disposition of it, which will prevent them from returning it to the sheriff, or in any other manner, defeat their lien. It would, therefore, seem that it cannot be taken in execution by another creditor, either of the original debtor, or claimant. [McRae and Augustin v. McLean, 3 Porter's Rep. 138; Pond v. Griffin. 1 Ala. Rep. N. S. 678.]

In Hagan v. Lucas, [10 Peters' Rep. 400,] it appears that property had been levied on by execution, from one of the circuit courts in this State, and a bond given to try the right, as in the present case; afterwards, a writ of *fieri facias* issued from the district court of the United States, was levied on the same property, and a claim interposed, as the statute prescribes. The district Judge was of opinion, that the proceedings in the State court being undetermined, the property was in the custody of the law, and not subject to the levy by the marshal. The cause was removed by writ of error, to the supreme court of the United States, where the judgment was affirmed. That court held, that the bond being conditioned for the return of the property to the sheriff; if the right shall be adjudged against the claimant, it cannot be considered as a substitute for the property itself. The object of the legislature in requiring such a bond was, to insure the safe keeping and faithful return of the property to the sheriff, if its return should be required. If the property should be adjudged liable to execution, a levy on it at the suit of a third person, would occasion a forfeiture of the condition of the bond—a result so repugnant to equity, as such a proceeding would occasion, would not be sanctioned. *Again:* On giving the bond, the property was placed in the possession of the claimant—it is not withdrawn from the custody of the law, but the claimant, instead of the sheriff, is made the custodian. In the hands of the claimant, under the bond for its delivery to the sheriff, the property is as free from the reach of other process, as it would have been in the hands of the sheriff. [See, also, 1 Show. Rep. 174; 3 Munf. Rep. 417.] The reasoning of the court in the case cited from Peters, applies with all force to the case at bar; for the condition of the bond, is substantially the same in each. They both provide for the return of the property in the event of a decision,

adverse to the claimant in the one case, and the defendant in attachment in the other.

The case of McRae and Augustin v. McLean, authorises the surety of the defendant, to return the property to the sheriff in discharge of the bond; and can this be done, if it is liable to seizure on other process? Upon the execution of the bond, the law must regard the property as in the custody of the defendant in attachment, and his surety, in order that they may comply with its condition. But it is argued for the plaintiffs in error, that by the return of the slave in question, to the possession of the defendant in attachment, the lien of the attachment was lost, and he became subject to their execution; and to sustain this argument, Dunklee v. Fales, [5 N. Hamp. Rep. 527,] has been cited. In that case the furniture attached, was permitted by the plaintiff, to be returned to the defendant's possession without any bond having been first executed for their safe keeping and delivery. The court decided, that to make a valid levy, the officer must take possession of the goods; and to retain the lien, which the attachment creates, he must keep the goods out of the possession and control of the debtor. If he permit them to go into his possession, and under his control, any other creditor may attach and hold them. This case is entirely unlike the one before us. There, the levy became ineffectual to continue the lien, because the possession of the property was returned to the debtor; here the lien was continued by the execution of the replevy bond; and as by law, the defendant in attachment might, under such circumstances, have the custody of the property, with the assent of his surety, we cannot conceive that any consequence prejudicial to the latter, can result from such possession. The possession of the debtor must be consistent with the rights of the surety, and subject to his control, so as to enable him to give effect to those rights.

The right of the surety to return the property to the sheriff, invests him with a special property in it; and to maintain that property, he must be permitted to assert a claim under the statute. It follows from this view, that the charge to the jury was correct, and the judgment of the circuit court is consequently affirmed.

STEAMBOAT ROBERT MORRIS AND OWNER v. WILLIAMSON.

1. The lien given on a steam-boat, by the act of 1836, for failing to deliver goods as specified in the bill of lading, continues until the first day of July next after the non-delivery, according to the terms of the bill.
2. The lien thus created, when goods are damaged, is not waived by their acceptance by the consignee or owner; nor by a receipt specifying that they have been received in good order To make a waiver there must be a knowledge of the injury, and an intention to abandon a remedy; or some contract which is in consistent with the existence of the lien.

APPEAL from the County Court of Sumter county.

THIS is a proceeding, by way of libel, commenced on the 18th day of March, 1840, against the steamboat Robert Morris, which, after seizure, was claimed and stipulated for by Alphonso Brooks.

The libel charges, that certain goods, on the 28th day of December, 1839, were shipped on board the steamboat, at Mobile, in good order, to be delivered in like good order, at Gainesville, to one Lewis, the dangers of the river only excepted, he paying freight therefor at the rate of one dollar and fifty cents per barrel. The contract of freight is evidenced by bill of lading, which is exhibited, and the ownership of the goods is alleged to have been in Williamson. The goods are alleged to have been damaged, to a considerable extent, on the trip, and not delivered in good order. Condemnation of the steamboat, &c., is prayed in compensation of the damage incurred.

The answer of the claimant denied the allegations of the libel, and prayed that a jury might inquire of the same.

It also sets up other matters of defence, which may be thus stated.

1st. That the goods were caused to be delivered by the steamboat according to the undertaking, and were received on account of the libellant at Gainesville, and were received by him.

2. That the goods were received by the libellant without ex-

ception thereto; and thereby, he then and there released and discharged a.l claim and lien on such boat.

3. That if the goods were damaged, it was caused by the dangers of the river, and not otherwise.

4. That ne.ther Lewis, the consignee, nor the said libellant paid, or offered to pay, the freight, or any part of it, on said goods, and that the same remains unpaid.

5. That the libellant ought to be barred of this judgment, because he did not proceed to trial at the first term of the court after filing his libel.

The case was submitted to the jury on the libel and answer, without any exception by either party, and a verdict was returned for the libellant, assessing his damages at 436 dollars; for which, judgment of condemnation against the steamboat was rendered, and also against the stipulators, it having been discharged on bond.

At the trial, the shipment of the goods was proved by the production of the bill of lading containing the contract recited in the libel. It was also proved, that the steamboat proceeded on her trip from Mobile no further than Demopolis, where, the water failing, she transferred the goods to the steamboat Favorite, without the knowledge or consent of the libellant, to be by her delivered at Gainesville, whither she proceeded with them. The goods were so much damaged when taken on board, that the Favorite would give no bill of lading for them, and were in such a damaged condition that some of the boxes containing them were split and broken, and had the appearance of having been wet. The contents of the boxes seemed to be wet to some extent; but they were not opened until after being received, and after the libellant had given for them a receipt, stating that he had received them from the Favorite in good order. The libellant was advised, before receiving the goods, not to receive them, on the ground that they were damaged; but he replied, he had just come to the country, and it might be said he was inclined to be difficult to please, or the like; and, therefore, he would take them, and pay the freight. The freight on the goods was estimated at 285 90-100 dollars, of which sum the libellant paid 65 dollars, and applied to borrow the remainder, but did not obtain it; and it remained unpaid. There was no proof that he had tendered the balance due of the freight money. The day after receiving the

goods, they were examined, and found to be much damaged, and injured forty per cent. of their value. The goods consisted of household furniture of great value, and were contained in boxes and barrels, and, thereby, their condition could not be readily discovered, or the full extent of the injury known.

On this state of proof, the defendant requested the court to instruct the jury,

1. That if the goods were delivered by the steamboat Favorite, for the steamboat Robert Morris, and were received by the libellant without any exception, then no lien existed afterwards against the last named boat.

This the court refused; but instructed the jury, that a lien would exist against that boat to the extent of the damage sustained, if that damage was done on the Robert Morris, unless the libellant had expressly waived his right after being advised of the extent of the injury.

2. That if the libellant received the goods at Gainesville, from the steamboat Favorite, knowing they were damaged, and without making exception, then, that the lien on the Robert Morris was thereby discharged, although the libellant had not ascertained, by examination, the full extent of the injury done them.

This was refused; but the jury was instructed, that no lien would exist in such a case for the damages which the libellant had ascertained when he received the goods; but that a lien did exist for any damages the goods received after they were put on board the Robert Morris, and before they were delivered at Gainesville, and which the libellant had not ascertained at the time he received the goods from the Favorite.

3. That if the boxes containing the goods plainly indicated, by their appearance, that the contents were damaged, and the libellant, having the opportunity, neglected to make the examination, but received the goods without making exception, then he could not enforce a lien against the Robert Morris for injuries sustained by the goods upon their conveyance.

This was refused, without any attempt to modify it.

4. That it was incumbent on the libellant, before he could sustain this proceeding, to show that he had paid, or tendered, the entire freight on the goods.

This was refused; and the jury was instructed, that the boat

was bound to deliver the goods according to the bill of lading, before it could demand freight on them.

5. That it was incumbent on the libellant, under the allegations of the libel, to prove he was prepared to pay the freight before he commenced this suit.

This was refused; and the jury was instructed, that if the boat had parted with the possession of the goods, it had thereby lost its lien on them for the freight, and it was unnecessary for the libellant to prove a tender or payment, or a readiness to pay the freight.

The claimant excepted to the refusal to give the charges requested, and, also, to those given; and having appealed from the judgment rendered against him, here assigns error in the bill of exceptions.

Bliss, for the plaintiff in error, insisted that the lien upon the boat was waived by the libellant receiving the goods without exception. If no presumption of waiver arose from receiving the goods, it certainly did when the libellant acknowledged in writing, that he had received them from the Favorite in good order. If such is the effect of the admission, the charge given in response to that requested in the first instance, is manifestly erroneous. Under the circumstances of the case, it should have been left to the jury to determine whether the conduct of the libellant was a waiver of the lien.

Metcalfe, *contra*, contended, that, if there was injury sustained, the lien could only be discharged by an express waiver. The statute continues the lien until the 1st day of July after the lien attaches. [Clay's Digest, 139, § 22, 23, 24.] Where a statute creates a lien, it is not waived by an express contract, unless the contract is inconsistent with the lien. [Peyroux v. Howard, 7 Peters, 324.] In the ordinary case of supplies furnished, and a credit given, the lien is not waived when the supplies are furnished to a foreign ship. [Brig Nelson, 1 Sumner, 73.] These cases establish, that the notion of waiver can only arise when such is the intention of the party.

GOLDTHWAITE, J.—1. It is not pretended by the libellant's counsel, that there is any lien on the steamboat independ-

ent of the statute; and the claimant insists that, even if a lien is thus given, that it must be considered as having been waived under the circumstances shown in evidence.

The act of 1836, [Clay's Digest, 139,] after giving a lien upon steamboats, or other water craft, to any person who shall furnish materials, labor or stores for their use, provides that, if such lien shall not be enforced on or before the first day of July then next ensuing the furnishing of such materials, &c., such lien shall cease to exist. It provides, also, that this lien shall be enforced in any court having jurisdiction of the amount due; and specifies how the boat, &c., may be replevied. The section of the act, which is supposed to govern this case, is in these terms: "Whenever any steamboat, or other water craft, shall receive on board any goods, wares, or merchandise, as freight, to be delivered at any specified landing, and shall fail to deliver the same as specified by the bill of lading, the owner or consignee of such goods, wares or merchandise shall be entitled to a lien on such boat or other water craft, to be sued for and recovered in like manner."

It is not probable the Legislature intended to provide only for a total loss of the goods shipped; for that, although somewhat common, was by no means the most frequent cause of loss to the shipper. When goods, which have been received in good order, and, by the terms of the bill of lading, are to be delivered, have been injured on board the craft, and the injury is not within the exceptions contained in the bill of lading, they can never be delivered "as specified by the bill of lading"; such an injury is then within the words, as well as the spirit of the enactment.

We think the statute intended to make this, as well as all the other liens created by it, determinable on the first day of July, although that day is only mentioned in connexion with materials, &c., furnished. We are induced to this conclusion because, if the lien was to determine with the departure of the boat, it would be ineffectual in all but a very few cases; as it is notorious they leave, in most cases, within a few minutes, frequently within a few seconds of the delivery.

It never could have been intended to make the lien, in cases of injury, dependent upon the sailing of the craft, as it is by the course of the admiralty law. It would be equally inconsistent to suppose the lien was always to continue; for this would effectually impede all sales of vessels of this description. We con-

clude, then, that liens of this description, in general, are lost, if not enforced by the 1st of July, after the injury; though there may be cases which, from their peculiar circumstances, would create an exception, by continuing the lien until an opportunity could be afforded for a seizure.

2. The instructions of the county court, with respect to the supposed waiver of the lien, must be understood in connexion with the circumstances in evidence: and it would have been proper to have charged the jury, that these did not amount to a waiver. Indeed, it is difficult to imagine how one can waive a matter of which he is ignorant.

We think no presumption of waiver can arise, unless the party has a knowledge of some injury sustained, and some act is done with the intention to waive the peculiar remedy; or, unless there is a specific contract inconsistent with the existence of the lien. [Peyroux v. Howard, 7 Peters, 324. Brig Nelson, 1 Summer, 73.]

It is evident, that the facts of this case do not bring it within any of these principles; and that they do not warrant the instructions requested by the claimant. Therefore, although the charges given may not be entirely correct, in the broad terms in which some of them are announced, yet they had no tendency to mislead the jury when considered in connexion with the evidence. In this connexion, they may be considered as free from any error which could affect the verdict.

Judgment affirmed.

BOYD, ADM'R v. DENNIS.

1. If an execution be issued in the life-time of the defendant the *lien* may be continued after his death by an *alias* or *pluries*. But if there be a chasm by the lapse of a term, an *alias* cannot issue, but the judgment must be revived by *scire facias* against the personal representative.

ERROR to the Circuit Court of Pike.

This was a motion by the plaintiff in error, to quash an execution. The facts were, that the defendant in error obtained a judgment against the intestate of the plaintiff, upon which execution issued; after which, and before the return day thereof, intestate died. No other execution issued on the judgment for more than a year afterwards, when an *alias* was issued and levied on certain slaves of the deceased, in the hands of the plaintiff in error, as his administrator.

Upon this state of facts, the court overruled the motion to quash, from which this writ is prosecuted.

Buford, for plaintiff in error, cited 4 S. & P. 237; 3 Ala. Rep. 254; 4 id. 326, 681; 1 Sand. Rep. 280, note 8.

J. Cochran, *contra.*

ORMOND, J.—In the case of Collingsworth v. Horn, [4 S. & P.] this court held, that, where an execution had issued in the life time of the defendant to the judgment, and an *alias* and *pluries* have regularly issued, after his death, without the lapse of a term, that the *lien* of the original execution was preserved; and that the property of the deceased could be sold under the last execution, without a *scire facias* against his administrator, to revive the judgment.

In this case, there is no controversy about the *lien* of the first execution. The only question is, whether, in the event of the death of the defendant in execution, after an execution had issued against him, a *pluries* may be issued after the lapse of more than a year, without reviving the judgment against the administrator.

We think it very clear, that the execution was issued irregularly in this instance. According to the case cited from 4 Stew. & Port., it was allowed thus to continue the *lien* created by the first execution, and to levy and sell under an *alias* or *pluries.* Here, then, was a chasm by the intervention of two entire terms. There was, therefore, no connecting link between the original and *alias* executions; and the latter being issued after the death of the defendant, was irregular, without a *scire facias* against his personal representative to revive the judgment.

The judgment of the court below, overruling the motion to quash the execution, must be reversed; and a judgment quashing the execution, be here rendered.

THE STATE v HARKINS.

1. The Circuit Court cannot refer to the Supreme Court, as novel and difficult, a question of law arising in a criminal case, until it has rendered judgment therein.

On points referred as novel and difficult from the Circuit Court of Shelby.

The defendant was indicted for an assault and battery, with the intent to murder; and upon an affidavit, that John W. Wiggins, who resided in the State of Mississippi, was a material witness for him on the trial, that he could not prove the same facts, (all of which were particularly stated,) by any other witness within his knowledge, he moved the court for a commission to take the deposition of the witness; his motion was overruled, the cause continued, and the question, whether a deposition could be taken and received as evidence in such a case, was referred to this court for its decision, as novel and difficult.

The Attorney General for the State, moved to dismiss the case on the ground, that this court could not take jurisdiction of a case referred as novel and difficult, until it had been tried in the primary court.

Peck, for the defendant.

COLLIER, C. J.—The 18th section of the act of 1820, provides, "that the judge of the circuit court may, at discretion, on a point reserved, motion in arrest of judgment, or for a new trial, in any criminal case, respite the judgment or sentence, and reserve such point or motion for the Supreme Court at their next succeeding term; and in such case, the Supreme Court shall pronounce judgment, sentence or decree, as the law directs, and award execution accordingly." [Clay's Dig. 294, sec. 32.] By the first section of the thirteenth chapter of the penal code, it is enacted, "Whenever in any criminal case, either on the trial, or on demurrer, or on motion in arrest of judgment, any point or

question shall arise, which, in the opinion of the presiding judge, is novel and difficult, it shall be his duty, on request, to reserve such point or question distinctly upon the record, for the revision of the Supreme Court at its next succeeding term, and the presiding judge shall proceed to render judgment on the conviction; but the execution of the judgment shall be suspended," &c. It is needless to consider whether the last statute does not fully provide for the subject matter embraced by the first, and, of consequence, repeal it by implication. Neither of the acts authorize the reference of a question to this court as novel and difficult, until a trial of the defendant has been first had. In respect to the first statute, such was the view taken at a very early day after its passage. [Phleming v. The State, Minor's Rep. 42; The State v. Reece, Id. 266.] Though, perhaps, we might not entirely adopt all the reasoning employed by the court in those cases, we cannot doubt the correctness of their conclusion.

The last enactment is too explicit to render construction at all necessary: for it expressly declares, "the presiding judge shall proceed to render judgment on the conviction;" showing conclusively, that the defendant must be first tried before points arising in his case can be referred as novel and difficult. These statutes being our only warrant for taking cognizance of cases referred, any response to the question presented would be extrajudicial and unauthoritative; and, in our judgment, inexpedient and improper.

The case referred is, therefore, dismissed.

ETHRIDGE v. FULLER.

1. When the record discloses that a cause has been in court for three years, and has once been continued by consent, the judgment will not be reversed, although no service or writ appears in the transcript, and although the appearance of the defendant's attornies is on their motion stricken out. The proper course, if there was no service or waiver, was for the defendant to explain the condition of the record, by affidavit, and ask its correction.

WRIT of Error to the County Court of Mobile County.

In the transcript sent to this court, there is no writ. The declaration is entitled of February term, 1840, and it appears the cause was continued by consent, at the February term, 1841, and again, for want of papers, at February term, 1842. At the February term, 1843, the parties came, by their attornies, and on motion of Gibbons and Fisher, their appearance for the defendant was stricken out, at their request, and a jury rendered a verdict for the plaintiff, on which judgment was given.

The defendant now insists, by his assignments of error, that he was not before the court, and for that cause the judgment is erroneous.

GIBBONS, for the plaintiff in error.

LESESNE, *contra.*

GOLDTHWAITE, J.—This belongs to that class of cases in which we have so often refused to reverse judgments on account of the supposed omission of service of the writ. Here, for three years, the cause remains in court, and the record shows it to have been once continued by consent, and also, that the parties came by their attornies at the term when the trial was had. If in truth there was no service of process, nothing was easier than for the defendant to have explained the condition of the record by affidavit, and we are not called on to presume the court below would have omitted to correct the entries, which in effect, conclude the defendant if they are inconsistent with the facts, Nor, is it a legitimate presumption, when the court has, immediately after its action in striking out the appearance of the gentlemen named, proceeded to try the case, that it also intended to declare the defendant was not in court. In addition to all that the record discloses previous to the judgment, we perceive that a motion was made by the defendant's attornies afterwards, to correct the judgment entry, so as to correspond with the facts which occurred at the trial, which facts are said, in the entry of the motion, to be set out in an affidavit, likewise omitted in the transcript. It is proper to remark, that the entry of the judgment is as much the matter of exception, as any thing which can occur in the proceedings of a cause, and if it is entered in defiance of the truth,

means exist by which the action of the court can be controlled, and the injury redressed.

The absence of the writ and its service, from the transcript, are controlled by the express terms of the record, and therefore, there is no cause for reversal.

Judgment affirmed.

CALDWELL v. KIRKPATRICK.

1. A general covenant of warranty of title in a conveyance of land, is not a covenant of *seizure*. but is equivalent only to a covenant for quiet enjoyment.

Error to the Circuit Court of Butler.

Action for breach of covenant by the plaintiff, against the defendant in error.

The action is for a breach of covenant of warranty, in a deed for a lot in the town of Greenville. The breach is thus alleged: "Yet the said plaintiff in fact saith, that said defendant hath not kept his said covenant in this, that said plaintiff was ousted from the possession of the said premises by superior title in law—and in this likewise, that said defendant did never place defendant in possession of the said premises, and plaintiff hath not been able to obtain possession thereof by legal process. In this, also, that plaintiff was not seised at the time of the delivery of said deed of said premises, and could not, and would not, make livery of seizen according to said covenant: Wherefore, &c."

The defendant pleaded a special *non est factum*.

Pending the trial, a bill of exceptions was taken; by which it appears that the plaintiff, to show the breach of the covenant of seizin, introduced evidence tending to prove, that at, before, and subsequent to the making and delivery of the deed and covenant sued on, one Robert Reed, was in possession of the premises granted in the deed, and claiming title and right of possession to

the same, and that he refused, on demand, to deliver possession to plaintiff, under said deed. Also, evidence tending to prove that said defendant never had possession of said premises at any time. There was no proof that said defendant had ever had at any time, title of any sort to the premises.

The plaintiff requested the court to charge the jury, that if they believed the evidence, it would establish a breach of the covenant of seizin; which charge the court refused, and charged the jury, that the proof of these facts would not be a breach of the said covenant, without further proof, showing that said Reed held under color of title by some written contract or agreement, showing either a legal or equitable title in him; to which the plaintiff excepted. The defendant had a verdict and judgment, from which this writ is prosecuted. The assignment of error presents for revision, the refusal of the court to charge, and the charge given.

Cook, for plaintiff in error.

Boling, *contra*, cited 2 Johns. Rep. 395; 7 id. 258, 376; 11 id. 122.

ORMOND, J.—The question to be settled in this case is, what is the import of the general covenant of warranty, upon a sale of lands in this State.

In England, anciently, the covenant of warranty authorised the tenant, if he lost the lands, to recover of the warrantor, lands of equal value. This rule was of feudal origin, and according to the opinion of Chief Justice Parsons, in Gore v. Brazier, [3 Mass. 544,] had been so far relaxed before the settlement of this country, as to permit the tenant ousted, by title paramount, to maintain a personal action of covenant broken, on a real covenant of warranty. Be this as it may, it is certain, that in modern times, the general warranty in a deed has been considered a personal covenant, though in England, and in many of the States of the Union, it has gone into disuse, and been superseded by the more definite and precise covenants of seizin, right to convey, for quiet enjoyment, against incumbrances, and for further assurance. [Platt on Cov. 305.]

In this State, the most usual covenant, where one is entered into upon the sale of lands, is a general covenant of warranty of

title. In our opinion, the only effect of this covenant, in this State, is for quiet enjoyment, which is an assurance against the consequences of a defective title, or of any disturbance in the enjoyment of the land conveyed.

This is conclusively shewn by referring it to its origin at a remote period of the common law. Its effect then, as we have shown, was to entitle the tenant, when *evicted*, to recover lands of equal value, from the warrantor—the silent operation of time, has converted the remedy into a personal action for damages, not for a defect of title in the grantor, or because there was an outstanding paramount title, but because the grantee had been ousted from the possession by one having a paramount title, and this answers only to the modern covenant for quiet enjoyment.

This has been the decision in other States. Thus, in Emerson v. Minel, [1 Mass. 464,] in an action upon such a covenant as this, the court held, there could be no recovery without proof of an *eviction*, and Sedgwick, Justice, said, "that it was in fact, and in essence, a covenant for quiet enjoyment." The same doctrine was asserted in Townsend v. Van Cortlandt, [6 Cowen, 123.] It is also so considered in Kentucky and Virginia, as is shown by the citations in 2 Lomax's Dig. 273, and doubtless in all the States where this covenant is used, as it is impossible to suppose at this day, that it is not a personal covenant. [4 Kent's Com. 4 ed. 472.]

The effect then of the general covenant of warranty being for quiet enjoyment, we proceed to inquire, what rights are acquired under it, and what obligations it imposes. To constitute a breach of this warranty, it is not necessary there should be an actual expulsion—the covenant secures a legal entry, as well as the enjoyment of the lands. [Ludwell v. Newman, 6 Term Rep. 453; Platt on Cov. 327; 2 Lomax's Dig. 269; Gardner v. Kittletas, 3 Hill, 332.]

In this case, it appears that the grantor had neither the title or the possession of the premises, at the time of the warranty, but that the possession was in one Reed, who claimed title and right of possession to the same. The counsel for the plaintiff, it is true, erred in considering the warranty a covenant, that the grantor was seized in fee of the premises, but the court also erred in charging the jury that the covenant was not broken, because it did not appear that Reed held under color of title, by some written con-

tract or agreement. Until the grantor proved he had title to the land conveyed, the possession of Reed was sufficient evidence of title in him, and the plaintiff could not be required to commit a trespass by ousting him. The possession of Reed was *prima facie* evidence of title in him, which could only be repelled by evidence on the part of the grantor of a title paramount to his.

Let the judgment be reversed, and the cause be remanded.

Ex parte HARKINS.

1. A commission cannot issue, according to the common law, to take the deposition of a non-resident witness, at the instance of the defendant in a criminal case; and there is no statute in this State authorizing such a procedure.

The petitioner was indicted in the Circuit Court of Shelby for an assault and battery upon Westley Gragg, with the intent to murder him. Thereupon, he moved the court for a commission to take, by deposition, the testimony of a witness resident in the State of Mississippi—first showing by a letter from the witness, and his own affidavit, that the evidence would be material and important for his defence. The motion was overruled; and the petitioner now moves this court for a *mandamus* to the circuit court, commanding it to issue a commission pursuant to his motion.

Peck, for the petitioner, insisted, that, although the statute did not authorize a deposition to be taken in such case, yet it was entirely competent for the circuit court, in virtue of its inherent powers to award a commission to take the testimony of a witness resident without the State. He cited Greenleaf's Ev. 367; 1 Wash. C. C. Rep. 236, note. The case of The People v. Restill, [3 Hill's Rep. 295-6,] determines, that, although testimony, *de bene esse*, cannot be taken by the prosecutor against the defendant's consent, yet the same rule does not hold where the defendant himself proposes to take a deposition.

S. F. Rice, for the State, contended, that it was not allowable to read depositions in a criminal case, according to the rules of the common law. This was clearly shown by the case of The People v. Restill, [3 Hill's Rep. 289.] In England, and in New York, there has been some legislation on the subject; but in this State, we have no statute which introduces any modification of the law.

COLLIER, C. J.—Mr. Greenleaf, in his admirable treatise on Evidence, [p. 367–8,] says, that the method of obtaining the testimony of witnesses resident abroad, has always been familiar in the courts of admiralty; and he supposes it to be within the inherent powers of all courts. The law of nations, [says he,] requires the courts of justice of different countries to assist each other for the furtherance of justice; and, hence, when the testimony of a foreign witness is necessary, the court, before which the action is pending, may send to a court, within whose jurisdiction the witness resides, a writ, called a letter rogatory, requesting the court abroad to cause the deposition of the foreign witness to be taken in due course of law. The court of chancery has always freely exercised this power; but the learned author says, the courts of common law seem not to have asserted it in a direct manner and of their own authority. They have, however, used means to coerce the adverse party to consent to the examination of witnesses who were absent from the State. These coercive means were such as putting off the trial, or refusing to enter judgment, as in case of non-suit, if the defendant was perverse; or by a stay of proceedings, till the party, applying for the commission, could have recourse to a court of equity, by instituting a new suit there, auxiliary to the action at law. Subsesequently, however, the courts refused to do that by indirection which they could not do directly, and by legislative enactment; but in Great Britain, and the most of the States of the Union, the inconvenience has been remedied. [Greenl. Ev. 369—370–1–2–3–4.

Mr. Blackstone, [3 Com. 383,] in treating of the trial by jury, and its defects, in connection with the limited powers of courts of law, says that these courts have not the power to examine witnesses abroad, or such as may be going abroad, and receive their depositions in writing, *de bene esse.* This, says he, may be done

at any time through the channel of a court of equity. Such was the law in respect to depositions taken in civil cases pending in common law courts, independently of statutory regulations.

In The People v. Restill, [3 Hill's Rep. 289, N Y.,] the question was most elaborately and learnedly considered, whether, according to the principles of the common law, a deposition could be taken and read as evidence in a criminal case, without reference to the consent of parties. The conclusion was, that the common law did not authorize evidence to be thus taken in such a case. The court say, that the authority for using depositions as evidence in Crown causes, is the statute of 1 & 2 Phil. and Mary, ch. 13, which requires the magistrates, before whom a prisoner is brought, to take his examination, and the information of them that bring him, put the same in writing, and certify it to the next gaol delivery within his commission. This statute applies only to felonies; and it is settled, that depositions taken in the manner it prescribes, are not admissible in cases of misdemeanor. [Rex v. Paine, 1 Salk. Rep. 281; 1 Ld. Raym. Rep. 729; 5 Mod. Rep. 163; Comb. Rep. 358; Carth. Rep. 405.]

The learned counsel, who moved for a *mandamus*, has cited The People v. Restill to show, that, although witnesses cannot be examined *de bene esse*, at the instance of the State, yet they may be, after indictment found, at the instance of the defendant. It is certainly stated in the opinion of the court, that such is the law in New York; but the court cite several legislative provisions of that State to which the common law is indebted for a modification in this respect. In that case, [Matthews v. Port, Comb. Rep. 63, and Vin. Ab. Evidence, [A. b. 32, pl. 7,] are commented on, and the conclusion attained, that the case in Comberbach, which is noticed by Mr. Viner, is an incorrect report of what was, at most, a mere *dictum;* and does not lay down the law with accuracy. [See also 3 Dane's Ab. ch. 87, art. 2 & 3; 2 Starkie's Ev. 485.]

No statute has been enacted in this State, which authorizes a deposition to be taken in a criminal case; and the fact that the attention of the Legislature must have been called to the subject, when it provided this method of taking testimony in a civil suit, should disincline us to grant the motion, even if we thought the matter was within our discretion. Without attempting to controvert what Mr. Greenleaf says about the inherent powers of

courts, as founded upon the law of nations, it is quite enough to say, that neither the courts of England or the United States, which proceed according to the course of the common law, have at any time, in virtue of such power, claimed the right to cause testimony to be taken by deposition. And we are unwilling to be the first to make a precedent. If the greater inconvenience or injustice is likely to result from the law as it now stands, which we very much question, the Legislature can provide the appropriate remedy.

The view taken has led us to the conclusion, that the circuit court had not the authority to make the order which the defendant sought; and this court cannot, consequently, award the *mandamus*, but must deny the motion for that purpose.

HEADON v. TURNER, ADMINISTRATOR.

1. The administrator of an intestate, against whom a judgment has been recovered, when living, is the proper party to sue out a writ of error, and may do so on application to the clerk. If he supersedes the judgment, it may be affirmed with damages, as in other cases.

GOLDTHWAITE, J.—A motion is made for judgment on a certificate of the clerk of the county court of Sumter county, which recites, that, at the February term, 1843, of that court, John Headon recovered a judgment against James House for 1082 dollars; that House is now dead, and Benjamin D. Turner is his administrator. That Turner, administrator, applied for, and obtained a writ of error, giving bond, &c. The question is, whether a judgment of affirmance can be rendered on this certificate.

A writ of error, by the course of the common law, issued out of the court of chancery, and was considered as a new action. [2 Wms. Saund. 101, *a;* 101, *g.*] When the defendant to the judgment, in debt or damages, died after judgment, his executor

or administrator was the proper party to sue out the writ. [6 Comyns' Digest Pleader, 313, *g*.

It is true, our statutes have changed the manner of issuing the writ, but they do not affect the right of the party in interest to sue it out in all the cases where it was allowable by the common law. By the act of 1820, [Clay's Digest, 306, § 3,] it is made the duty of the clerks of the circuit courts, on the application of the party against whom any final judgment shall be rendered, or on the application of the attorney of the said party, to issue a writ of error returnable to the Supreme Court. The same rule is extended to the county courts by the act of 1821. [Clay's Digest, 297, § 4.]

It is evident, that the strict letter of this statute does not include the case of a person who becomes connected with the judgment in consequence of the death of the defendant; nor does it reach the case of a plaintiff, who wishes to reverse a judgment rendered in his favor; yet it is every day's practice for the latter to sue out a writ of error on application to the clerk.

We think the statute must receive the reasonable construction of extending to all cases in which a writ of error could be sued out at common law; and we incline to this opinion, because there seems to be an evident intention to allow the writ in its most general sense.

It is true, this court, on three occasions, [Sewall v. Bates, 2 Stew. 462; S. C. 3 ib. 199; Bettis v. Taylor, 6 Porter, 333,] had directed process to issue hence to the court below; and we do not now doubt its authority to do so, in virtue of its general superintendence and control over inferior jurisdictions. But if the power to allow writs of error in a case like this, and to many which are similar, is not with the clerk, great injury might result to a suitor. The case of a death pending the execution, will illustrate the necessity which exists for giving these acts a liberal construction.

We have, however, had a somewhat similar point before us at a former term; and, in Perrine v. Babcock, [6 Porter, 391,] we held, that where there were several defendants, the death of one could be suggested in the writ issued by the clerk, at the instance of the others. We then held, that, as to cases not within the terms of the statute, it was our duty so to mould the process, as to produce the least inconvenience to parties; and that, unless

injury would result from that course, it would always be preferable the writ should issue from the court below.

The statute, under which plaintiff in error is authorized to suspend the judgment, is sufficiently broad to cover every case, inasmuch as the bond is to be given by the party applying for the writ; [Clay's Digest, 307, § 6;] and the statute was extended to a writ of error issued from this court in Bettis v. Taylor, [6 Porter, 335.]

This view of the subject shows the writ of error was properly issued; and, therefore, the party is entitled to judgment on his certificate.

DEXTER AND ALLEN v. NELSON.

1. A conveyance of land, by one against whom the land conveyed was held adversely by claim of title, is void.

ERROR to the Circuit Court of Montgomery.

Trespass to try title to a lot in the town of Montgomery, by the plaintiffs against the defendant. It appearing that the defendant was tenant to one Dargan, the latter was permitted to defend.

Upon the trial, the plaintiffs produced a patent from the United States for one hundred and sixty acres of land, which, it was admitted, embraced the *locus in quo*, which issued to John Falconer; and, also, produced, and proved, a deed from Falconer to them for the premises sued for; and, having proved the trespass and damage, rested.

The defendant then proved, that, previous to the execution of the conveyance from Falconer to the plaintiffs, he was the owner and in possession of the premises sued for, holding adversely to Falconer by a deed from one Stewart.

The court charged the jury, that if Dargan, by his tenant, was

in the adverse possession of the lot previous to the conveyance by Falconer to the plaintiffs, that such conveyance was void, and the plaintiffs could not recover.

The charge of the court is assigned for error.

WILLIAMS, for the plaintiffs in error. The rule, that lands held adversely cannot be sold, is not part of the common law, but is founded on the statute, [32 Henry, 8,] and grew out of a state of society entirely different from ours. He cited 4th Kent's Com. 439; 1 Stew. 229.

GOLDTHWAITE, *contra*, to show that a conveyance by one out of possession, with an adverse possession against him, was void, cited 4th Kent, 441; 5 Pick. 348; 6 Mass. 418; 5 Johns. 489; 4 How. 13; 3 Litt. 20; 8th Cowen, 382, 589; 4 Mason, C. C. 326. The statute of uses merely dispenses with livery of *seizin*.

ORMOND, J.—Our first impression was, that the sale and conveyance of the land in this case was not void in consequence of the adverse possession of the defendant in error, as no statute similar to that of the 32 Henry 8, had been passed in this State. We are satisfied we were mistaken. The original simplicity of the common law admitted of no estate in lands which was not clothed with the immediate *seizin* and possession thereof. The ancient common-law mode of conveying lands was, by *livery of seizin*, and necessarily includes the idea of a sale of lands by one not in possession.

Lord Coke, commenting on the text of Littleton, *that no entry could be reserved to a stranger upon a feoffment*, says, "here Littleton reciteth one of the maxims of the common law, and the reason hereof is for avoiding maintenance, &c., and, therefore, nothing in action, entry or re-entry, could be granted over." [2 Thomas Coke, 99, 214, *a*.]

The statute, [32 Henry, 8,] and which has been re-enacted, substantially, in most of the States, was not passed for the purpose of making void sales of land where the land was held adversely to the vendor, but to punish the parties concerned in it; the penalty being the whole value of the land. In a decision upon this statute, Montague, Ch. Justice, says, "In this point, the statute has not altered the common law, for the common law

before the statute, was, that he who was out of possession, ought not to bargain, grant or let his title; and if he had done so, it should have been void; then the statute was made in affirmance of the common law, and not in alteration of it; and all that the statute has done is, it has added a greater penalty to that which was void by the common law before." [Partridge v. Strange & Croker, 1 Plowden, 88.]

It is unnecessary to add other citations, as it is clear that the deed offered in evidence by the plaintiff, being made by one not entitled to the possession, was void.

Let the judgment be affirmed.

Doe ex dem. HEYDENFELDT v. MITCHELL.

1. Where one has been in possession of land for several years, built a house and made other valuable improvements thereon, the inference is, that his occupancy is legal, and that he has such an interest as may be sold under execution. The purchaser of land thus occupied, at a sale under execution, may maintain an action to recover the possession of the occupant.

Writ of Error to the Circuit Court of Tallapoosa.

This was an action of ejectment for the recovery of the south half of section five, in township twenty-one, and range twenty-three, situate in the county of Tallapoosa. The cause was tried under the usual consent rule, on the plea of "not guilty," and a verdict and judgment rendered for the defendant. From a bill of exceptions sealed at the trial, it appears that one Taylor built a house on the land in question, and took possession thereof, in the latter part of the year 1838, and made valuable improvements thereon. Sometime afterwards, Shackleford, the father-in-law of Taylor, resided in the house with him up to the fall of 1842, or spring of 1843, when the latter left the country. The defendant also, the son-in-law of Shackleford, about the time of Taylor's removal came to reside in the house with Shackleford. The

plaintiff then produced a judgment from the Montgomery circuit court, rendered in March, 1842, against Taylor and Shackleford, in favor of the bank, and the execution and levy on which the premises were sold on the first Monday in July, 1842; and also a regularly authenticated sheriff's deed to the lessor of the plaintiff. *The court charged the jury*, that unless the evidence shewed that the defendant derived title or possession from Taylor or Shackleford, or claimed under them, the plaintiff could not recover; and unless this appeared, the possession of Taylor and Shackleford did not constitute such a legal estate, that a sale under execution affected the rights of the defendant. The plaintiff prayed the court to charge the jury, that the prior possession and valuable improvements was *prima facie* evidence of legal title in them, in the absence of proof to the contrary; which charge the court refused to give. *Further*, the plaintiff prayed the court to charge the jury, that the possession of Taylor and Shackleford, was *prima facie* evidence, that their estate was such as was subject to sale under execution; which charge the court refused to give, and instructed the jury that it was not *prima facie* evidence of title, as against the defendant, unless it appeared he claimed under Taylor or Shackleford. To the refusal to charge the jury, as prayed, and to the charges given, the plaintiff excepted, &c.

Harris and Haydenfeldt, for the plaintiff in error.
W. P. Chilton, for the defendant.

COLLIER, C. J.—It may be laid down, generally, that a mere possessory right to lands, accompanied with actual possession, may be levied on under a *fieri facias*, and sold in satisfaction of the judgment. [16 Johns. Rep. 192; 18 id. 94; 3 Caine's Rep. 189; 9 Cow. Rep. 73.] This principle is not, however, without its exceptions. In Rhea, Conner & Co. v. Hughes, [1 Ala. Rep. 219,] it was decided, that the mere possession and improvement of land belonging to the United States, no matter how valuable, cannot be levied on and sold under execution; and in Doe ex dem. Davis v. McKinney and McKinney, at June 1843, we determined, that if the possession be referable to an equitable title, the property can only be subjected to sale through the medium of a court of equity. This latter decision was influenced by the

act of 1820, which declares that the legal title only shall be sold under execution, and that the equitable estate shall be reached by suit in chancery. [See further, Smith, et al. v. Hogan, 4 Ala. Rep. 93.]

There is nothing in the record, from which it can be inferred, that the possession of Taylor and Shackleford comes within any exception to the rule stated. It is said, that they had occupied the land about four years, built a house and made other valuable improvements on it. From all this, it may be presumed, that they were not mere trespassers, but rather, that their occupancy was legal. Under this view of the case, it will follow, that the sale under execution was regular. In Doe ex dem. Davis v. McKinney and McKinney, *ut supra*, it was held, that a purchaser at a sale under execution, acquires all the legal rights of the defendant, [Jackson v. Gridley, 18 Johns. Rep. 98;] and the latter becomes *quasi* his tenant, and will be deemed to continue in that character, until an actual disseisin or disclaimer on his part. [Jackson v. Sternbergh, 1 Johns. Cases, 153; Avent v. Read, 2 Porter's Rep. 482.] If then, Taylor and Shackleford, upon being ousted, could have maintained an ejectment, the plaintiff, who, by his purchase, was substituted to all their rights, is entitled to the same remedy. This is not only a legal conclusion, from what has been said, but it is well settled upon authority, that a prior possession for a period short of that in which the statute of limitations will operate a bar, will entitle such possessor to maintain ejectment against one who has not a paramount title. [Smoot and Nicholson v. Lecatt; 1 Stew't Rep. 598; and cases there cited. See also, Stodder v. Powell, id. 287.]

It is needless to consider, with particularity, the charges given and refused by the circuit Judge to the jury; for it is clear, that the law was declared to be very different from what we have ascertained it to be. The judgment is, therefore, reversed, and the cause remanded.

SAUNDERS v. CAMP.

1. When the judgment entry shews a sufficient admission to charge the garnishee, his answer, although in writing, and sent up with the transcript, can not be looked into to impeach the judgment, unless it is referred to in the entry, or made a part of the record, by some specific exception.

WRIT of Error to the County Court of Sumter County.

This is a proceeding by Camp, as the judgment creditor of one Chiles, to subject a debt due to the latter by Saunders. The judgment entry recites, that the garnishee answered an indebtedness of 119 dollars, for which judgment was given, and on which, this writ of error is prosecuted.

The transcript sent to this court, sets out an answer of Saunders, in writing, purporting to have been sworn to in open court, the 16th February, 1843, (the judgment is entitled of Februay term, of the same year) but no reference is made to it in the judgment entry, nor does it appear that any exception to the judgment was then made.

This answer states, that the garnishee, on the 4th January, 1843, was indebted to Chiles, in the sum of 119 dollars. That in the forenoon of the same day, he agreed to accept an order from Chiles, in favor of one Chapman, if Chiles would give it, for the balance which might be due him on settlement. Chapman presented a written order from Chiles, in the afternoon of the same day, but the garnishee process had then been served.

LYON, for the plaintiff in error, insisted, the answer could be looked into, for the purpose of showing that the court erred in arriving at the conclusion of indebtedness. [Fortune v. State Bank, 4 Ala. Rep. 385.]

If the answer is examined, it will be seen there is no admission of an indebtedness to the plaintiff; so far from this, he alleges that he had promised before the service of the process, to accept an order in favor of Chapman, for the amount due Chiles. This is, in effect, the denial of indebtedness to Chiles, and an admission

that he owes Chapman. [1 Stewart, 9; 3 Porter, 105; 6 ib. 365; 1 Ala. Rep. N. S. 38; ib. 421; 2 ib. 177; 4 ib. 386.]

R. H. Smith, *contra*, relied on the case of Gaines v. Bierne, [3 Ala. Rep. N. S. 114,] as settling that the answer cannot be looked into. But, if it can, the decision in Kennedy v. Geddes, [8 Porter, 263,] repeated in the same case in 3 Ala. Rep. N. S., shows that a naked, verbal promise to accept a bill not in *esse*, is not binding.

GOLDTHWAITE, J.—The conclusion to which we have come on the preliminary question, makes it decisive of the case, and therefore, we shall express no opinion on the question, how far the answer, standing alone, and unexplained by a *viva voce* examination, is sufficient to sustain the judgment.

In Gaines v. Bierne, [3 Ala. Rep. N. S. 114,] we held that the answer of the garnishee, whether *viva voce*, or in writing, is no part of the record, unless made so by bill of exceptions, or incorporated in the judgment by reciting its substance.

It is supposed, however, that the rule then declared, has been modified by the subsequent decision of Fortune v. State Bank, [4 Ala. Rep. N. S. 385,] where an answer in writing was referred to, and the judgment reversed, because not sustained by it.—The judgment entry in that case, recited, that Fortune had answered at a previous term, that he was indebted, and as there was at that term, no entry stating what that answer was, it was of necessity referred to; for otherwise, there was nothing for the action of the court when it gave the judgment. Absolute verity must be accorded to the records of a court, when it states its own action, or its own conclusion, but it by no means follows, that the same credit is due, when it states what was done at a previous term, unless, indeed, the judgment of the court is directed to the ascertainment of the fact, which it undertakes to assert. In such a case, it is probable, the question would be settled by an entry *nunc pro tunc*.

In the present case, there is nothing whatever, besides the circumstance of finding the answer in the transcript sent to this court, to induce the conclusion that it was unexplained by a *viva voce* examination; but, conceding the answer is insufficient to sustain the judgment, we would then be forced to refuse credit to the

recorded judgment, which asserts that an indebtedness was admitted. This is a result which can only be attained in the manner pointed out by the decision made in Gaines v. Bierne, before cited.

Judgment affirmed.

THE STATE BANK v. SMITH.

1. Under the act of 1829, the Circuit Court may appoint a trustee, upon the death of the trustee appointed in the deed.

ERROR to Marengo Circuit Court.

This was a trial of right of property. An execution having been sued out by the bank against one Adams, and levied upon certain slaves, the property was claimed by the defendant in error as trustee of Mrs. Adams, and a verdict and judgment was rendered in his favor.

Upon the trial, it appeared that the property in question had been given to Mrs. Adams by her father, by a deed, in which one Howell C. Adams was trustee. That Howell C. Adams died, and, thereupon, at the instance of Mrs. Adams, the circuit court of Marengo appointed the defendant in error trustee. This was before the commencement of this suit. The property was shown to be in the county of Marengo.

Upon this evidence, the counsel for the bank moved the court to instruct the jury, that the appointment of Smith, so made by the circuit court, did not invest him with the legal title to the property conveyed in the deed of trust.

Which charge the court refused; and charged, that the order of the circuit court did transfer to him the legal title to the property so conveyed; to which the plaintiff excepted, and now assigns for error.

MURPHY, for the plaintiff in error.

MANNING, *contra.*

ORMOND, J.—The act, under which the defendant in error was appointed trustee by the circuit court, was evidently intended to prevent the necessity of resorting to a court of chancery for the appointment of a trustee. The first section gives the court power to remove a trustee; and the second, to receive the resignation of one; and in both cases, to appoint another to act in his stead. [Clay's Dig. 581.]

The statute does not, in terms, authorize the court to appoint a trustee, when the trustee appointed by the parties dies; but we have no doubt that the power of the circuit court so to act, is within the spirit and intention of the enactment.

This appears, not only from the general scope and design of the law, but especially from the 5th section, which provides that, "for the prosecution or defence of any suit in any of the courts of this State, the court, before whom such suit may be pending, may, on motion, appoint a trustee or trustees to prosecute or defend the same, in all cases where the same may be necessary." If, then, the trustee in this deed had died after the claim was interposed, there can be no doubt that the court could have appointed another to act in his stead. It would be difficult to assign a reason for giving this power to the court to appoint a trustee to enable the suit to be carried on, and deny it for the purpose of commencing or defending one.

The act of 1843, [Clay's Dig. 350, § 32, 33,] which gives to the registers of the courts of chancery the power to receive the resignation of a trustee, and to appoint one in case of death, cannot be considered a repeal of the statute we have been considering. It does not appear that there was any intention to repeal it, nor is there any conflict between them; but, on the contrary, both may well stand and be operative. It is an established rule in the construction of statutes, that an affirmative statute does not repeal an existing statute, except so far as it is repugnant to or inconsistent with its provisions.

Nor is there any weight in the suggestion, that the statute was repealed when the common law judges were prevented from the exercise of chancery jurisdiction by the establishment of separate chancery courts. The power of appointing trustees was confer-

red on the courts, as courts of common law, and was, therefore, not impaired by the transfer of the equitable jurisdiction of the court to the chancellor.

Let the judgment be affirmed.

CRADDOCK v. STEWART'S ADM'R.

1. Where an administrator makes a warranty of the soundness of personal property belonging to his intestate's estate, which he sells under an order of court, he is chargeable for a breach in his representative character.

WRIT of Error to the Circuit Court of Lawrence.

This was an action of debt, at the suit of the defendant in error, upon a writing obligatory, made by the defendant on the 4th of January, 1838, for the payment of seventeen hundred and forty-one dollars, on the 25th day of December, 1839. The defendant pleaded, 1. Payment. 2. Fraud. 3. Failure of consideration. 4. A tender of the amount *really* due. 5. A partial failure of consideration. On these pleas, issues were joined, and the cause submitted to a jury, who returned a verdict in favor of the plaintiff, for the balance due on the note for debt and damages; and a judgment was rendered accordingly.

On the trial, the defendant excepted to the ruling of the court. It was admitted, that at the sale of the intestate's estate, in January, 1838, by the plaintiff as administrator, the defendant bought four of the negroes, viz: Billy, a man, for one thousand and ten dollars; Jesse, a boy, for six hundred dollars; Robert, a boy, for one thousand and one dollars; and Shadrack, a man, for eight hundred and seventy-one dollars. That the price of Billy is part of the consideration of the writing declared on, and he is one of the negroes mentioned in a bill of sale, executed by the plaintiff to the defendant, on the 4th day of January, 1838. It was also admitted, that about two weeks after the sale of Billy, the defendant offered to return him to the plaintiff, and rescind the contract thus

far, alleging that he (Billy) was unsound; but the plaintiff refused to receive him. The defendant then read as evidence, a bill of sale, of the date mentioned above, which stated, that the plaintiff, as the administrator of his intestate, had sold to the defendant, Billy, Jesse, Robert and Shadrack, for the sum of thirty-four hundred and eighty-two dollars, and then proceeds as follows. "All of which, I, as administrator aforesaid, warrant to be sound, and slaves for life, and the title good and indisputable. Given under my hand and seal," &c. and signed thus: "Isaac N. Owen, adm'r, [seal.]" *Further*, he adduced evidence, tending to show that Billy was diseased, as early as 1834, of a spinal affection, and so continued, with more or less pain, up to the 3d of August, 1839, when he died.

The defendant prayed the court, to give several charges to the jury, which were refused, but need not be particularly noticed, as the same legal questions arise upon the charge given, which is as follows, viz: That although this suit was brought by Owen, as administrator, and the bill of sale executed by him in that character, yet the warranty therein was his personal covenant, which bound him individually; that to make the defence of unsoundness available, it was necessary to charge Owen with fraud, in the concealment of the disease. Although the jury might believe, that Billy was unsound at the time of the sale, and so continued up to his death, yet, as it was not pretended that Owen had been guilty of fraud, the unsoundness constituted no defence.

T. M. Peters, for the plaintiff in error.—Where an administrator sells personal property, with a warranty of soundness, it is to be regarded as binding upon the estate he represents, and he is chargeable in his representative character. There is no statute or rule of law, which prohibits him from making a warranty in such case—if any benefit results from it to the seller, it enures to the estate, and in consequence of this, the estate must be liable for a breach. If the administrator were charged personally, he would be permitted to reimburse himself from the assets; this being the case, there can be no objection to the purchaser avoiding the payment of his note, by showing the falsity of the warranty. [Batterman v. Peirce, 3 Hill's Rep. N. Y. 171; Ricks, adm'r v. Dillahunty, 8 Porter's Rep. 134; Wiley, et al. v. White & Leslie, adm'rs, 2 Stew't Rep. 331.] An agent with authority to

sell, may make a warranty, and by a parity of reasoning, it would seem that an administrator may do the same. [Gaines v. McKinley, 1 Ala. Rep. N. S. 446; Rice & Moore v. Richardson & Keith, adm'rs, 3 id. 428. See also, 4 Arkansas Rep. 289; 1 Nott & McC. Rep. 194; 2 id. 153; 3 Porter's Rep. 221.]

W. Cooper, for the defendant in error, insisted that an administrator could not bind the estate of his intestate, by a warranty of the soundness of a part of it, which he sold. 3 Ala. Rep. 428; 1 Nott & McC. Rep. 194; 2 id. 153; 4 Arkansas Rep. 289, cited by the plaintiff in error, are entirely unlike the case at bar. They are cases in which there was fraud on the part of the executor, or administrator, as the warranty arose by implication of law.

The case of Gaines v. McKinley, [1 Ala. Rep. 446] bears no resemblance to the present, either in principle, or in point of fact. There, an agent was authorised to sell a slave, and the court held, that authority to warrant, was given by implication. But, here an administrator is the agent of the law—is sometimes called a trustee, and cannot execute his trust, otherwise than the law prescribes.

All warranties, even of title by an administrator, are conventional. [Ricks, adm'r v. Dillahunty, 8 Porter's Rep. 137.] A debt due by an administrator, individually, cannot be set off against a demand due to him in his representative character. If a sheriff sell property, not belonging to the defendant in execution, the plaintiff is not bound to refund to the purchaser. [McGee v. Ellis & Browning, 4 Litt. Rep. 244.]

COLLIER, C. J.—The only question arising in this case, is, whether an administrator, in virtue of his powers as such, can make a warranty of the soundness of personal property belonging to the intestate's estate, which he sells under order of court, so as to make himself answerable for a breach in his representative character? It is laid down, generally, after administration is granted, the power of an administrator is equal to the power of an executor. [2 Wms. on Ex'rs, 601; 1 Lomax's Ex'rs, 343–4, and cases there cited. Shep. Touchstone, 474.] *Further*, that an executor or administrator, has the same property in the personal effects of the deceased, as the latter had when living.—[1 Wms. Ex'rs, 508; 1 Lomax's Ex'rs, 344.] And, it is said,

that he has an absolute power of disposal over them—may sell, pledge or mortgage them, and that this power is necessary, to enable him to perform his duty in paying debts, &c. [2 Wms. Ex'rs, 609, 610–11; 1 Lomax's Ex'rs, 344–5–6–7.] Such were the powers of an executor or administrator, at the common law, and we think it clearly inferrable, that it was competent for him to warrant either, the title or soundness of property of the deceased, which he disposed of; and if the transaction, as between the vendee and himself, was fair and *bona fide*, it would be obligatory upon the estate.

In White's heirs v. White's adm'rs, &c. [3 Dana's Rep. 374,] the administrators were authorised and directed by the heirs, to sell the slaves of the decedent: they were accordingly sold at public auction, on a credit of twelve months, to the highest bidder, and a bill of sale executed to the purchaser of one of them, by the administrators, with a warranty of soundness. Suit was afterwards brought upon the warranty against the administrators, and a judgment recovered for damages and costs; which they paid. The question was, whether the administrators should have an allowance out of the funds of the estate, for the amount paid by them on the judgment. The court thought the authority to sell, was general; and though the administrators might not have been bound in the discharge of a fiduciary trust, to impose on themselves a personal responsibility; yet, as they did so, for the benefit of the estate, they ought to be therefrom indemnified; the more especially as the warranty they made, was such, as is usually required by all prudent purchasers of slaves. The authority to the administrators in the case cited, was not conferred, as upon ordinary agents, but was given to them as the trustees of the estate they represented. If it was merely an agency in fact, the power to warrant would be a legal implication, and the case would not be at all pertinent; but the court seems not to have taken this view of it, but treated the sale as one made by the administrators as such, although they were authorised by the heirs to sell. [See, also, Pelham, adm'r v. Cravens, et al. 4 Ark. Rep. 289.] The court were further of opinion, that the administrators should not be made personally responsible upon their warranty of soundness, unless they "acted with bad faith, wilful default, fraud or gross negligence." And to this point are cited, 3 Lit.

Rep; 184; 1 Monr. Rep. 256; 1 J. J. Marsh. Rep. 167; 4 Johns. Ch. Rep. 419. See, also, 2 Nott & McC. Rep. 153.

The power of the executor or administrator, to warrant the soundness of property, results from the right to sell, pledge or mortgage—in fact, is embraced in it. And the inquiry then is, whether, or how far, his common law powers have been modified by statute?

The act of 1809, enacts, that "in all cases, where it may be necessary to sell the whole, or any part of the personal estate of any testator or intestate, it shall be the duty of the executor, administrator or guardian, to apply to the orphans' court of their county, for an order of sale, and upon obtaining the same, to advertise the time and place of such sale, in three or more public places in their county, at least thirty days previous to the day of sale, and then and there proceed to sell the same, at public sale, to the highest bidder, giving at least six months credit, the purchaser giving bond, with approved security." [Clay's Dig. 223, § 13.] A statute passed in 1810, authorises the orphans' court to permit the executor, administrator, or guardian, to sell "the crop belonging to the estate, in such manner as shall seem reasonable, and the situation of the estate require." [Id. 224, § 15.] It is further provided, by an act passed in 1815, that sales by executors and administrators, shall begin at twelve, and close at five o'clock; and they shall be continued from day to day, upon giving public notice, &c. if they shall not be completed on the first day designated: "and all sales which may be commenced and held in any other manner than herein directed, shall be null and void." [Id. § 14.]

These are the only statutes which, in any manner, interfere with the right of the administrator to sell the personal estate of his intestate—they only regulate the time and mode of the sale, without inhibiting either expressly or by implication, the right to warrant the title or soundness of the thing sold. An executor or administrator must, necessarily, from the nature of the trust, be invested with a discretion in the discharge of his duties. If wisely exercised, the power to make a warranty, may sometimes prove beneficial. Thus, if the title to, or soundness of property, is so seriously questioned, as greatly to lessen its value in the estimation of those who desire to purchase; and if the administrator is satisfied that the suspicion is not well founded, his indemnity to

the purchaser by a warranty against defects, might greatly enhance the price.

The cases of Ricks' adm'r v. Dillahunty, [8 Porter's Rep. 133,] and Rice & Moore v. Richardson & Keith, adm'rs, [3 Ala. Rep. 428,] which were cited for both parties, are not in conflict with this view. So far as the present case is concerned, the former merely affirms the familiar principle, that a sale by an executor, administrator, &c. does not imply a warrant of title, unless there be fraud; or perhaps, in some instances, gross negligence. The latter declares that fraud, in a sale made by an administrator, of his intestate's effects, is a valid defence to the contract, even when sought to be enforced by an administrator *de bonis non.*

The warranty of the administrator being obligatory upon the estate he represents, there can be no question, but he may avail himself of a breach as a defence to an action for the purchase money. This point was so adjudged in Peden v. Moore, [1 Stew't & P. Rep. 71.] And in Batterman v. Pierce, [3 Hill's N. Y. Rep. 174,] it is considered as a settled principle, that when the demands of both parties spring out of the same contract or transaction, the defendant may recoupe, although the damages on both sides are unliquidated. The court say, "It was formerly supposed, there could only be a recoupment, where some fraud was imputable to the plaintiff in relation to the contract on which the action was founded; but it is now well settled, that the doctrine is also applicable, where the defendant imputes no fraud, and only complains that there has been a breach of the contract on the part of the plaintiff. For the purpose of avoiding circuity, or the multiplication of actions, and doing complete justice to both parties, they are allowed—and compelled, if the defendant so elect, to adjust all their claims growing out of the same contract in one action. [See Green v. Linton, 7 Por. Rep. 133; Hill v. Bishop, 2 Ala. Rep. 320.]

The circuit court was of opinion, that the warranty was a mere personal undertaking of the plaintiff, and that its falsity was no defence to the action. In thus stating the law, we have seen that the court erred—its judgment is consequently reversed, and the cause remanded.

DAVIS v. PRESTON.

1. D contracts with P to pay him 600 dollars, for his services in superintending certain mills, for twelve months from the first of January, 1839...300 dollars to be paid on the first of June, and 300 dollars at the expiration of the year. P voluntarily left the service of D in December...In an action by P on the contract, averring a breach in the non-payment of said sums of money, or either of them---*Held*, to be no error to refuse to charge. that the plaintiff was not entitled to recover, as his right to the 300 dollars first to be paid, was clear, however it might be as to the other.

WRIT of error to the Circuit Court of Baldwin county.

Assumpsit by Preston against Davis, upon an agreement in writing made between the parties, the 31st January, 1839. By the terms of the agreement, Preston undertook to stay at, superintend and keep in repair certain mills, belonging to Davis, for twelve months from the 1st January of the same year. Davis, on his part, agreed, at the expiration of six months from the 1st January, to pay Preston 300 dollars, and 300 dollars more at the expiration of the year, for the good performance by him of what he had agreed to do. It was stipulated, that, if Preston should wish to be absent from the business, he might be so on giving timely notice to Davis, provided the mills were in a condition to admit it; but he was not to be absent for more than ten days at a time; and his wages, during his absence, were to be deducted. It was also stipulated, that Preston should not return to, or be, in a state of intoxication at any time, and, if he did, he should forfeit fifty dollars for each offence, to be also deducted from his wages. Some other stipulations were included, but they do not affect the question raised.

The declaration sets out the contract at large, and avers performance by the plaintiff of all things on his part to be done and performed; and the breach is, that the defendant has not paid the sums of money, or either, or any part of them.

The defendant pleaded *non-assumpsit*, payment, set off, and accord and satisfaction; and the jury found a verdict for the plaintiff for 571 dollars, on which judgment was given.

At the trial, the defendant offered evidence tending to prove that Preston had admitted that he voluntarily quitted the service of Davis on the 9th December, 1839; and, on this proof, requested the court to instruct the jury, that the condition of the agreement that Preston should serve twelve months, was a condition precedent; and that the term of service must be performed before the plaintiff could recover in this action. This was refused.

The defendant then requested the charge, that, if the jury should believe that Preston voluntarily left the mill of Davis before the expiration of the twelve months mentioned in the agreemant, then that the plaintiff was not entitled to recover.

This was also refused, and the defendant excepted. These refusals to charge are now assigned as error.

Blount, for the plaintiff in error, insisted, there could be no recovery on this contract, as the plaintiff voluntarily left the defendant's service before the expiration of the term agreed for. [Mortmain v. Lepeaux, 6 Martin's Rep. 654; Thorp v. White, 13 John. 53; McMillon v. Vanderlip, 12 ib. 165; Read v. Moore, 19, ib. 337; Gray v. Gordon, 17 ib. 188; Norris v. Moore, 3 Ala. Rep. N. S. 676; Givhan v. Dailey, 4 ib. 336; Cunningham v. Morrell, 10 John. 203; Starke v. Parker, 2 Pick. 267.]

Dargan, *contra*, contended, there was no error in the charge, as the plaintiff was certainly entitled to recover for the six months' service. [Cunningham v. Morrell, 10 John. 203; Few v. Marsteller, 2 Cranch, 24.]

GOLDTHWAITE, J.—There is some doubt with us, whether the plaintiff was entitled, under this contract, to recover the three hundred dollars agreed to be paid at the expiration of the year; but however this may be, that was not the question raised in the court below. The defendant there insisted, that no recovery against him could be had, unless the service was performed for the entire time; and that the plaintiff's abandonment of his service previous to the expiration of the year, prevented any recovery in the action as brought. This view of the contract cannot be sustained. It is true, the argreement of the plaintiff was, to serve until the expiration of the year; but the defendant was to pay him one half in June, and the other in January afterwards.

It may be conceded, therefore, that no recovery could be had for the last payment, and yet the right to receive the first would not be affected.

There is no doubt, we think, that a right of action accrued under this contract. The service contracted for was performed until the 1st of June, and the sum agreed upon was not then paid. The right of action for this sum being thus perfect, could not be destroyed by any subsequent conduct of the defendant; nor do we see how it could be affected by his claiming that more was due. The breach assigned in the declaration is, that neither of the sums of money, nor any part of them had been paid. The averment of performance is, that the plaintiff has done all things necessary on his part to be done; and it does not follow that, because the plaintiff has omitted to show he is entitled to recover both sums, that he is entitled to neither.

The case is not different from that of an agreement to pay a given sum in instalments; and in such, when the consideration of the payment is services, it is only necessary to show a performance, *pro rata*. [Cunningham v. Morrell, 10 Johnson, 203.] A contract for the payment of distinct sums at different periods, is very much in the nature of distinct contracts; and an action of debt for each sum will lie as it becomes due. [Few v. Marsteller, 2 Cranch, 24.]

This view shows, that the court below properly refused to give the charges requested. Whether the defendant might not have had another charge in his favor with respect to the second payment contracted to be made, need not be examined, as no opinion of the court was sought in that aspect of the case.

Judgment affirmed.

PREWITT v. CHAPMAN.

1. An instrument, purporting to be a bill of exchange, which does not direct to whom the money is payable, may be the foundation of a suit, in the name of the person from whom the consideration moved, and to whom it was delivered by the drawer; but an action cannot be, maintained thereon, by a third person, as bearer.

ERROR to the Circuit Court of Mobile.

This was an action of assumpsit by the defendant in error, as bearer of two bills of exchange against the plaintiff in error, as acceptor of one, and as drawer of the other.

The declaration contains two counts in the usual form, by the plaintiff as bearer, against the defendant as drawer and acceptor, and also the common counts—and upon the general issue, with notice of the set-off; the plaintiff had a verdict.

From a bill of exceptions, it appears that the plaintiff offered in evidence, two instruments of writing, of the following tenor.

Exchange for $2,500.

Aberdeen, Miss. Nov. 24, 1839.

On the first day of March next, without grace, please pay this, my first and only exchange, at the counting room or domicil of Jesse G. Thomas, in the city of Mobile, twenty-five hundred dollars, value received, and charge the same to account of your

Ob't servant,

T. COOPWOOD.

To MARK PREWITT, Aberdeen, Miss.

Exchange for $1,021 44.

Aberdeen, Miss, Nov. 24, 1839.

On the first Monday of March next, without grace, please pay this, my first and only exchange, at the counting room or domicil of Jesse G. Thomas, in the city of Mobile, one thousand and twenty-one dollars and forty-four cents, value received, and charge the same to account

Of your ob't servant,

MARK PREWITT.

To Col. ABNER PREWITT, Athens, Miss.

Which bills were then and there duly accepted, whilst in the possession of one O'Neill.

It was also proved that the bills were presented at maturity at the proper place, and protested at the instance of Tartt, Stewart & Co., for non-payment, of which the defendant had due notice.

The plaintiff then closed his case, and the defendant's counsel moved the court to exclude the evidence, as being insufficient to establish a claim against the defendant, which motion was overruled.

The defendant then introduced testimony, conducing to shew that the bills were given by the drawers to one Patrick O'Neill, in settlement of a judgment of O'Neill against the drawer, Coopwood, and that after the same had been given to O'Neill, he delivered them to the plaintiff and one Houston, to indemnify them as his sureties. The defendant's counsel then moved the court to instruct the jury, that on this evidence the plaintiff could not recover, which the court refused, and charged that the plaintiff was entitled to recover, if the bills were assigned by O'Neill before the commencement of the suit.

Campbell, for the plaintiff in error.—An instrument cannot operate as a bill of exchange, unless the money is on the face of the paper made payable to some one. [Chitty on Bills, last ed. 139, 140, 155, 166; 2 Pardessus, 156; 1 Henry Blackstone, 608–9; Story on Bills, 71; 6 Wendell, 644; 13 Mass. 158; 19 Wendell, 566; 2 Hill, 59, 80.]

That to render an instrument negotiable, it must be intended, from the paper itself, that the person making it, intended to give it a transferable quality. He denied that any such inference could be drawn in this case—that O'Neill, to whom it was delivered, might, by proper averments, recover upon it, but he could not transfer this right to another.

That this case was unlike those cases where a blank was left for the name of the payee, or where the bill was made payable to and endorsed by a fictitious person. That in the first case, an authority might be presumed to fill up the blank; and in the latter, if the instrument could not operate as a bill payable to bearer, it would be void, and those putting it in circulation would profit by their own fraud.

PHILLIPS and DARGAN, *contra.*

The instrument purports to be a bill of exchange: the intent of the parties is apparent upon its face. It is called their bill of exchange, and appears to be for value. The only question is, shall the intent of the parties be carried out? If it is not construed as a bill payable to bearer, then it is waste paper. This would be to destroy the intent of the parties; or, if they intended what their declarations did not warrant, they meditated a fraud, and should not be permitted to reap its fruits.

They insisted, that the question was settled by the case of Gibson v. Minet, [1 H. B. 569,] as no distinction could be drawn between a fictitious payee and no payee; and that it was impossible to distinguish this case from the case of a blank left for the insertion of a payee. They cited 3 Term, 174; id. 182; 1 H. B. 569; 2 id.; 2 Hill's Rep. 59; 3 id. 112; Chitty on Bills' ed. 1839, 218; 1 Stephens' N. P. 570.

ORMOND, J.—The question presented on the record is, whether the instruments, which are the foundation of the action, are negotiable, so as to permit the defendant in error to maintain an action thereon in his own name as bearer.

The instruments are, in all respects, formal bills of exchange, except that no persons are indicated therein as payees.

It is clear, that every bill of exchange should specify to whom it is payable, to enable the acceptor to discharge himself from liability by payment to the proper person; and, indeed, on general principles of law, it would be void for uncertainty. [Story on Bills, 68; Chitty on Bills, 177, Am. ed of 1839.] Such is also the law of France, [2 Pardessus, 346.]

It is not denied, that the general rule is as stated; but it is insisted, that where the intention is apparent, courts will give effect to it; and that the legal intent is, that these bills are payable to bearer. The case of Gibson v. Minet, [1 H. B. 569,] is mainly relied on to support this proposition. It is well known, that the case referred to, was that of a bill drawn payable to, and endorsed in the name of, a fictitious person, the bill having been accepted with knowledge of the fact, and negotiated to one ignorant of these circumstances. The judges who gave effect to the bill against the acceptor, place their judgment on the supposed intention of the parties to it: that, by making it, and giving currency to it, they

must have intended it should be operative and effectual as a bill of exchange; and, as the holder could not derive title through the endorsement of a fictitious person, it must be considered, they intended it should be payable to bearer.

This artificial conclusion was plainly forced on the judges by the necessity of the case, and to prevent the consummation of the fraud. Since the decision of that celebrated case, it has been considered as settled, that an innocent holder of a bill payable to, and endorsed in the name of a fictitious person, may recover on it as on a bill payable to bearer.

It is not, however, necessary that the name of the payee should be inserted when the bill is drawn. If a blank is left for that purpose, it will be considered an authority to the holder to fill it up. [Cruchley v. Clarance, 2 M. & S. 90; Crutchly v. Mann, 5 Taunton, 529.] So it has been held, that when it was intended that the bill should be negotiable, and the words "or order" were omitted by mistake, they might be afterwards inserted, so as to charge an indorsee. [Kershaw v. Cox, 3 Espinasse, 246; Chitty on Bills, 219, ed. 1839.]

It may be then collected, that the intention is to govern; and where that is apparent from the bill itself, or by the proof of extraneous facts, effect will be given to such intention. [See the last reference to Chitty on Bills; also, Douglass v. Wilkerson, 6 Wendell, 644; 2 Hill, 59.]

Now, what evidence is there of an intention that these instruments should have the effect of bills of exchange payable to bearer? It is not shown, that there was any mistake in the draftsman, or that they are not precisely as the parties intended they should be. It is true, the instruments are called bills of exchange by the drawer, and, in their general structure, are like bills of exchange; and we may, therefore, infer that, as the consideration moved from O'Neill, he was the party intended to be benefitted; and, doubtless, on the proof made by the defendant, he could recover on the bills, as it cannot be presumed the parties meant to do a nugatory act, and they must therefore, have intended to transfer the right to the money to O'Neill. Does it necessarily follow, that they also intended to transfer this right to any other person who might come to the possession of the paper? Such may have been the intention, but, certainly, it cannot be pre-

sumed, in the absence of all proof of such intention, from the mere fact, that the consideration moved from O'Neill.

The decision in Gibson v. Minet is avowedly founded upon the necessity of the case, and was supposed to be necessary to prevent the consummation of the meditated fraud. There, the holder had no means of knowing that the indorsee was a fictitious person. Here, the bill disclosed on its face that it was not payable to the order of any one, or, generally, to bearer. Every one to whom the bill was offered, was apprised of the predicament in which it stood. There is, therefore, no necessity for the presumption of an intention not authorized by the terms of the instrument to prevent injury to an innocent holder.

Even in the case of a fictitious payee, the presumption of an intention to pay to bearer is not raised, if the holder knew the fact when he took the bill. [Chitty on Bills, 181 ; Hunter v. Jeffrey, Peake's Rep. Add. 146.]

In addition to the view here taken, in 1837, the Legislature passed an act, to be found in Clay's Dig. [326, § 76,] declaring "that all bonds, bills or notes, which shall be made payable to any person or persons, or bearer, or to any corporation or bearer, shall have the effect of creating an obligation or liability in favor of the corporation, or person or persons, only to whom any such bond or note may be expressly made payable ; and no one but such corporation, or such person or persons, or their endorsee or personal representative, shall have a right to maintain, in his own name, an action upon any such bond, bill or note." If, therefore, these bills were expressly made payable to Patrick O'Neill or bearer, this action could not be maintained by the holder as bearer ; but to enable him to maintain this suit in his own name, it would have been incumbent on him to deduce a legal title in himself by endorsement from O'Neill before the action was instituted.

Let the judgment be reversed, and the cause remanded.

EX. PARTE GRANT, ADM'R *de bonis non*, OF THE ESTATE OF McCORD, DEC'D.

1. A Judge of the Circuit Court is not authorised to award a *mandamus* in vacation, and the refusal to do so, however meritorious the grounds of the application may be, does not authorise the Supreme Court in virtue of its general superintendence and control of inferior jurisdictions, to grant the writ.

THE petitioner states that he became administrator, *de bonis non*, of the estate of David McCord, dec'd, by appointment of the orphans' court of Dallas, in 1838; in November, 1843, he filed his accounts, &c. for the purpose of a final settlement of the estate, and the then judge of that court, appointed the 21st of December last, as the day on which the same would be made. That before that day, the then Judge was superseded by the election of Addison J. Saffold to the judgeship. The present Judge, was of counsel for the petitioner, and under the direction of the statute, certified the same to the Judge of the circuit court, who, in obedience to the statute, appointed three persons as commissioners, to audit and settle the administration accounts, and to make distribution of intestate's estate. *It is further stated*, that two of three persons thus appointed, had refused to act, that an application had been made to the circuit Judge in vacation, for a *mandamus*, who declined awarding the same upon the ground that the law made no provision for compensating the commissioners, and consequently it was not compulsory upon them. Upon these facts, together with others, which need not be noticed, the petitioner prays this court to award a *mandamus* to the Judge of the circuit court, commanding him by the same process, to compel the commissioners to perform the duties which the law devolved upon them, in virtue of his appointment.

DOWNMAN, for the petitioner.

COLLIER, C. J.—The writ of *mandamus*, especially of late years, has been extensively used, and is certainly a most valuable auxiliary in the administration of remedial justice. It is ap-

propriately employed in many cases, where a party has a clear legal right, and no other adequate legal remedy. But we do not remember any case in which the Judge, unauthorised by statute, or rule of court, has ever awarded it in vacation. Mr Blackstone says, "a writ of *mandamus* is, in general, a command issuing in the King's name, from the court of King's bench, and directed to any person, corporation, or inferior court of judicature within the King's dominions, requiring them to do some particular thing therein specified, which appertains to their office and duty, and which the court of King's bench has previously determined, or at least, supposes to be consonant to right and justice." [3 Black. Com. 110. See also, 6 Dane's Ab. chap 186, art. 2.]

In the present case, no application has been made to the circuit court for a *mandamus*, but merely to the Judge of that court, who in our opinion could only entertain the petition in term time, and in open court. The refusal then, was a matter of course, and whatever may be the merits of the petitioner's case, which we purposely avoid considering, it is clear, that there has been no erroneous decision against him.

We have repeatedly held that the constitution inhibits the exercise of original jurisdiction in a case like the present; but that we would, in order to give us a *general superintendence and control over inferior jurisdictions*, entertain such a case, where the tribunal, the next in grade, had refused to act, or acting, had misapprehended the law. It results, that the application for a *mandamus* must be denied, at the cost of the petitioner.

HIBBLER & PEARSON v. DE FOREST, MORRIS & WILKINS.

1. One partner is not authorised, from his connexion in business, to accept a bill as a security for the debt of a third person: and an authority cannot be inferred from the circumstance that the business of the firm is that of commission merchants, to sell cotton, when the plaintiff is aware of all the circumstances under which the acceptance is given.

WRIT of Error to the Circuit Court of Mobile county.

Assumpsit by De Forest, Morris & Wilkins, on a bill of exchange, drawn in their favor by A. B. Wooldridge, agaist Child, Hibbler and Pearson as acceptors.

Child pleaded his discharge as a bankrupt, and the plea was confessed. Hibbler & Pearson pleaded the general issue, supported by an affidavit, that the bill was not accepted by them, or by any one with authority from them.

At the trial on this issue, it appeared the drawer of the bill was a planter, and desired certain hardware. He went to Child, one of the firm C., H. & P., and requested him to give the security of the firm to De Forest, Morris & Wilkins, who were hardware merchants, and willing to credit Wooldridge on that condition. The goods were delivered to Wooldridge, and he drew the bill, which was accepted by Child, in the firm-name of Child, Hibbler & Pearson. C., H. & P. were commission merchants and partners in trade in Mobile, but in no way indebted to Wooldridge, nor doing his business. The business of the firm was to receive from the country, and sell on commission, cotton, which might be sent to them for that purpose. The bill was accepted for the accommodation of Wooldridge. These facts were known to the plaintiffs. On this state of proof, the court charged the jury, that they might infer from these facts, that the acceptance of the bill was within the business of the firm, and that the defendants were liable on it.

This charge was excepted to, and is now assigned as error.

LESESNE, for the plaintiffs in error, cited Mauldin v. State Bank, [2 Ala. Rep. N. S. 502.]

DARGAN, *contra*, argued, that the office and business of commission merchants, required them to accept bills for their employers or principals, drawn on funds in their hands, or expected to be placed there.

GOLDTHWAITE, J.—The evidence set out in the bill of exceptions, shows that the acceptance of the firm was given by one of the partners as a security for a debt of a third person; and the question is, whether the jury was authorized to infer an au-

thority thus to bind the firm, from the circumstance that they were commission merchants for the sale of cotton.

It is well settled, both in England and in this country, that a partnership connexion does not, necessarily, invest one partner with the power to give a valid security in the name of the firm, either for his own private debt or for that of another. [Gow on Partn. ch. 2, § 2; Story on Part. 191.] The only difference in the application of the rule is, that, in England, it rests with the partners to show they did not consent; while here, the *onus* is cast on the plaintiff. [Story on Part. 192; Dob v. Halsey, 16 John. Rep. 34.] We say it rests with the plaintiff to show the consent of the other partners, but this must be understood with the restriction, that he is the party to whom the security is given; because it is held by several decisions, that a *bona fide* holder will be affected by the want of authority of the partner when the firm name appears. [Arden v. Sharp, 2 Esp. 524; Swan v. Steele, 7 East, 210; Chitty on Bills, 46; Ridley v. Taylor, 13 ib. 175.]

In the case before us, it is stated, all the facts were known to the plaintiffs, and, therefore, the *onus* is thrown on them of showing the consent of the other partners, who deny the authority of Child. It is not necessary there should have been an express assent: it may be implied from circumstances; but there were none such before the jury, unless the consent is to be inferred from the business followed by the firm. We can perceive nothing in the calling of commission merchants which makes them an exception to the general law. Doubtless, they frequently accept bills without being in funds, and on the mere expectation of business to be confided to them; but, if such was the ordinary business of this firm, nothing was more easy than to show it in evidence. It is not, however, our province to determine, in advance, upon what circumstances want of authority may be inferred: it is sufficient to declare that none such existed in this case when before the jury.

The result is, that we consider the charge given by the circuit court as erroneous.

Judgment reversed, and remanded.

COMSTOCK v. GIVENS.

1. If the Court improperly continues a cause, as to two out of three defendants, by the express or implied assent of the plaintiff, and thereby the entire cause is discontinued, he cannot afterwards obtain a *mandamus*, to require the court to restore the cause to the docket.

This was a motion for a *mandamus*. The petition sets forth that the plaintiff in error brought a suit in the circuit court of Benton county, on a bill of exchange, against the defendant in error and two others. That at the trial, the defendants suggested, that two of them had applied to the district court of the United States, for the benefit of the bankrupt law, and prayed a continuance. That the court, without his consent, and against his will, continued the cause as to two of the defendants; that the cause was then tried upon an issue as to the remaining defendant, (the plaintiff in error) and verdict and judgment for the plaintiff below. That he is advised that this erroneous action of the court will work a discontinuance of the cause, and if he is compelled to sue again, the action may be barred by the statute of limitations. He, therefore, prays a *mandamus* to require the circuit court to set aside the continuance of the cause, and the subsequent proceedings, and to reinstate the cause in the same condition as before the erroneous action of the court.

T. A. Walker, for the petitioner.
Rice, *cantra.*

ORMOND, J.—The record of the cause in the trial, of which the alleged erroneous action of the court took place, states the proceedings thus:

This day came the parties, &c. and the defendant's counsel suggested to the court, that E. L. Givens and Hugh L. Givens, have, since the commencement of this suit, applied for the benefit of the bankrupt law, and therefore, moved the court for a continuance of the cause. The plaintiff's counsel objected to the continuance asked; the court continued the cause as to the said

E. L. and H. L. Givens, but refused to continue as to the said William T. Givens, the other defendant. The court then overruled the demurrer to plaintiff's declaration, &c.

We held at the last term of this court, in a case like the present, that such a severance of the parties was a discontinuance of the entire action, and assuming that a *mandamus* is the proper remedy, we will proceed to inquire whether the record discloses that the cause was continued against the consent of the petitioner.

It appears that when the motion was made by the defendants, for a continuance of the cause for the reasons assigned, that it was objected to by the plaintiff, and that thereupon, the court continued it as to two of the defendants, and directed the trial to proceed against the other. It is not, it is true, stated that this was at the instance of the plaintiff, but such is the necessary conclusion from the record. *All* the defendants desired a continuance, the plaintiff opposed it, and when the trial is afterwards directed by the court to proceed against one of the defendants, clearly against his will, and the plaintiff makes no objection, it must be understood to be at his instance, and by his consent.

The court is passive, and only acts as it is impelled to action by the parties litigant before it. It was its duty to continue the cause as to all the parties, if it continued at all, but in truth, should not have continued as to any, for the reason assigned. When, therefore, we find the cause progressing against one defendant, certainly against his wish, and no dissent or opposition to that course by the plaintiff, the only possible deduction is, that if the course pursued, was not at the express instance and request of the plaintiff, that at least he did not dissent from it, and cannot, therefore, now complain of it.

These views lead us to the conclusion, that the motion must be denied. If the consequences which the plaintiff apprehends, flow from the action of the court below, the fault is not to be attributed to the action of the court, against his consent and contrary to his will.

Let the motion be denied.

VICKARS, USE, &c., v. MOONEY.

1. The answers of a nominal plaintiff, to interrogatories, exhibited under the act of 1837, "more effectually to provide for discoveries in suits, at common law," are not admissible evidence against the party for whose use the suit is brought.
2. In a case, in which chancery has jurisdiction, for the purpose of relief, the nominal and real plaintiff may be made defendants to a bill, and the former, if a competent witness, examined under an order of the chancellor, at the instance of the complainant.

WRIT of error to the County Court of Montgomery.

This was an action of *assumpsit*, by the plaintiff in error against the defendant. The cause was tried by a jury, who returned a verdict for the defendant, on which a judgment was rendered. The plaintiff excepted to the ruling of the court, in admitting the deposition of Thomas J. Vickars, in whose name the suit was brought for his use, although it appeared that the nominal plaintiff objected to being examined at the instance of the defendant.

FAIR, for the plaintiff in error. Vickars could not have been compelled to give evidence; and his objection to testifying, made his deposition inadmissible. [1 Stewt. & Porter's Rep. 17; 1 Ala. Rep. N. S. 506.] The deposition of a nominal plaintiff cannot be taken under the act of 1837, [Clay's Dig. 341,] nor can his answer to a bill of discovery be read against the real party in interest. Vickars would not be a necessary party to a bill in chancery, by the defendant; and if he was, his answer would not be evidence against a co-defendaut; but his evidence could only be admitted under an order from the chancellor to examine him as a witness. To these points he cited 2 Ala. Rep. N. S. 388; 2 Stewt. Rep. 163; 2 Stewt. & Porter's Rep. 361.

N. HARRIS, for the defendant. The act of 1837, if strictly construed, would be limited in its operation to bills of discovery, technically so called; but it should, and has been extended in practice to cases in which courts of equity would not only enforce a discovery, but grant relief. A liberal construction should

be given to the statute, so as to enable the courts of law finally to settle legal rights. If this view is not correct, it is suggested that the act of 1837 embraces both the real and nominal plaintiff. It is conceded, that the defendant might examine Vickars, though he was made a party to a suit in equity, jointly with him, for whose use the present action was brought. [See 2 Mad. Chan. 415.] Why not then examine him under the authority of the statute, that litigation may be more cheaply and expeditiously brought to a close?

COLLIER, C. J.—The act of 1837, "more effectually to provide for discoveries in suits at common law," enacts, that either party in an action at law pending in a circuit or county court, wishing a discovery from the adverse party, to be used in evidence on the trial thereof, may file interrogatories to such party, and call upon him to answer the same in solemn form on his oath or affirmation; and if it shall appear to the court, by the oath of the party filing such interrogatories, or otherwise, that they are pertinent and material, and such as the adverse party would be bound to answer upon a bill of discovery, the court shall allow such interrogatories, and make an order requiring the same to be answered by the adverse party in writing, on his oath or affirmation. The answers, thus made and filed, shall be evidence on the trial of the cause to the same purpose and extent, and upon the same condition, in all respects, as if they had been procured upon a bill in chancery for discovery, but no further or otherwise. If the interrogatories shall not be answered within sixty days after a copy is served on the adverse party, or be answered evasively, the court may attach him and compel an answer in open court, or it may continue the cause and require more explicit answers; or, if the party to whom the interrogatories may be propounded, be defendant in the action, it may set aside his plea or pleas, and give judgment against him by default; if he be the plaintiff, may order his suit to be dismissed with costs, as shall, in the discretion of the court, be deemed most just and proper: *Provided*, that, if the party so elect, he may exhibit his bill in chancery for a discovery; but, if having elected to file interrogaties, he shall not afterwards go into chancery for a discovery touching the same matters. [Clay's Dig. 341–2, sec. 160.]

In Goodwin v. Wood, [Ala. Rep.] it was determined, that the

object of this statute was to expedite and cheapen the administration of justice, by authorizing a discovery at law, where, in order to obtain it, it was previously necessary to resort to equity; and the answers of the party examined, are only evidence "in the same manner, and to the same purpose and extent, and upon the same condition," as if they had been elicited by a bill of discovery. The question to be considered is, whether the defendant could have exhibited his bill for a discovery against Vickars, and have used his answer as evidence against Alford, the party for whose use the suit was brought. In Chisholm, use, &c., v. Newton & Wiley, [1 Ala. Rep. 371.] this court held, that the admissions of a nominal plaintiff, made after the commencement of the suit, cannot be given in evidence to defeat the real party in interest. See, also, Brown v. Foster, [4 Ala. Rep. 285.] This case is well supported by authority, and the principle it determines must not only apply, where the admissions of the nominal plaintiff are sought to be proved by a third person, but where he testifies in open court, in answer to interrogatories or a bill of discovery. In this view of the matter, it is clear, that a bill of discovery cannot be exhibited by the defendant against one who is merely a plaintiff in name, for the purpose of obtaining his answer to defeat him who is the real suitor; and it results from this conclusion, that interrogatories, under the statute, cannot be exhibited to such a party, or, in other words, that he is not a party within the meaning of the act. A decision, the reverse of this, would put it in the power of the nominal plaintiff to effect a dismissal of the action, by failing to answer the interrogatories.

The facts stated in the deposition show, that the sum for which the note in question was given, was money won by betting on an election, a species of gaming denounced as unlawful by the laws of this State. To enjoin the collection of a note founded upon such a consideration, a court of equity would probably interpose. [See Fenno, et al., v. Sayre & Converse, 3 Ala. Rep. 476.] Vickers would be a proper party to such a bill, together with Alford, and might, upon the order of the chancellor, be examined as a witness at the instance of the complainant; yet it by no means follows, that, because his testimony might be obtained upon a bill for relief, that he may be examined upon interrogatories in a court of law. The letter and spirit of the statute are so

clearly opposed to such an idea, as not to require argument or illustration.

It is conceded by the defendant, that Vickars could not have been compelled to testify as a witness; and, having objected, his deposition could only be read as evidence under the act. We have shown that it is not admissible on that ground; and it follows, that it should have been excluded by the county court.

The consequence is, that the judgment is reversed, and the cause remanded.

LONG v. KENT.

1. L, K and B are co-sureties for a defendant in a detinue bond, conditioned to deliver a slave in the event of a recovery: pending the suit, L desires K, in whose possession the slave has remained, to deliver the same to the sheriff in discharge of the bond. K refuses, and afterwards delivers the slave to the defendant in the detinue suit, by whom it is run off, and thereby the sureties have to answer on the bond. The slave is afterwards regained, through the exertions of L and B, and sold. The proceeds, when divided between L, K and B, fall short of the sum paid by them. If the slave had not been eloigned, it would have sold for a greater price: *Held*, that these circumstances did not warrant an action of assumpsit, by L against K, and that the evidence was properly excluded in that form of action.

Writ of Error to the County Court of Butler County.

Assumpsit on the money counts. The suit was tried on the general issue, and on the pleas of payment and set-off.

The plaintiff gave in evidence, the record of a judgment obtained in the circuit court in favor of Daniel E. Starr, against William Burk, which showed an action of detinue to recover a slave. Affidavit in that suit had been made by Starr, under the statute, and a bond was executed by Burk, as principal, with Long, the plaintiff in this suit, Angus Brown, and the present defendant, as sureties, conditioned for the delivery of the slave in the event the plaintiff should recover it. The judgment in that

suit was, that Starr should recover the slave. The plaintiff then gave evidence tending to show that the slave was in the possession of Kent, the defendant in this suit, a short time before the trial of the suit between Starr and Burk, and that Long having become uneasy about his liability as surety on the before mentioned bond, applied to Kent for the said slave, in order to surrender it to the sheriff in discharge of the bond, but Kent refused to deliver the slave, or to permit it to be delivered, alleging his determination to keep the slave until the determination of the suit between Starr and Burk. Evidence was also given to show that the defendant had kept the slave out of the way of an officer, who searched for it to deliver it up in discharge of the plaintiff's liability, as one of the sureties on the said bond. That shortly after this, the slave was, by Kent, delivered to Burk, who run it to Florida, so that it was not forthcoming when the judgment was afterwards obtained by Starr; and that thereby Long, Kent and Brown, the sureties of Burk in the said bond, were compelled to pay the judgment obtained by Starr against Burk.

The plaintiff also gave evidence, tending to show that after the judgment in detinue by Starr against Burk, had been paid by the sureties on the bond of Burk, Long and Brown, with the knowledge and consent of Kent, went in search of Burk and the slave, not knowing where they were, Kent saying to them before they started, that he had incurred some expense in searching for Burk and the slave, and thought it right that Long and Brown should also do something in aid of getting them. He further proved, that himself and Brown were gone about thirty days, and found Burk and the slave in Florida, but could bring neither of them back, having no authority. Subsequently, a true bill was found against Burk for running mortgaged property beyond the limits of the State; and the plaintiff availing himself of this, in company with Brown, again went to Florida, and brought Burk and the slave back to this State, where the slave was afterwards sold under an execution, in favor of all of the said sureties, against Burk, on account of their liability on the said bond, and the nett proceeds were equally divided between them, both plaintiff and defendant receiving their proportion.

The plaintiff then showed in evidence, that if the slave had been delivered up by the defendant when demanded by the plaintiff, or had been sold soon after the judgment in the detinue suit, it

probably would have brought a price sufficient to satisfy the judgment; that slaves had declined in value since that time, and that the slave when sold, did not bring enough to satisfy the judgment in detinue, by 256 dollars.

This evidence was all excluded from the jury as irrelevant to the issue, on the defendant's motion. Whereupon the plaintiff excepted, and judgment being given against him, on the verdict rendered in favor of the defendant, he prosecutes the writ of error, and here assigns the exclusion of his evidence from the jury, as error.

Bolling, for the plaintiff in error.

Elmore, *contra*, cited Johnson v. Ballew, 2 Porter, 29; Keith v. Patton, 2 Stewart, 38; Byers v. Freeman, 1 Porter, 478; Evans v. Bolling, 8 Porter, 546; Caruthers & Kinkle v. Mardis, 3 Ala. Rep. N. S. 599; Driver v. Spence, 1 Ala. Rep. N. S. 540.

GOLDTHWAITE, J.—We have no doubt that a court is invested with the discretionary power to exclude evidence, either in whole or in part, whenever its irrelevancy to the issue before the jury is ascertained.

The case made by the plaintiff was not one which entitled him to any recovery in assumpsit, nor is there any portion of it from which the issue before the jury could be concluded, as there was nothing from which it could legally be inferred that any contract, express or implied, existed between these parties. The whole was irrelevant therefore, because no part of it conforms to the allegations of the declaration, which is in assumpsit. Whether the circumstances disclosed would warrant a recovery in an action on the case between these same parties, or an action of assumpsit, by Long and Brown against Kent, for the expenses incurred by them in searching for theslave, is not material to determine, as neither of these questions grow out of the record.

As there was no error in excluding the entire evidence, the judgment must be affirmed.

LYONS v. LONG.

1. A suit should not be dismissed for the omission of the plaintiff to give security for the costs, pursuant to a notice, if the plaintiff gives sufficient security at the next term of the court.

ERROR to the County Court of Talladega.

At the trial term of the cause, it was dismissed by the court, because security had not been given for costs, the plaintiff objecting, that no notice had been given, and that he was then ready to give the security. The only evidence that notice had been given, that security for the costs was demanded, was an entry on the docket of the Judge at the previous term, as follows: "Plaintiff required to give security in sixty days, or cause abates. This the court considered sufficient, and dismissed the cause.

This is now assigned for error.

BOWDON, for plaintiff in error, cited Clay's Dig. 316, § 29; 2 Stewart, 470; 7 Porter, 448.

L. E. PARSONS, *contra*.

ORMOND, J.—We do not think it necessary to enter on the consideration of the question, whether as the memorandum found upon the docket of the Judge did not state that the plaintiff was shown to be a non-resident, the court had power to dismiss the cause; because we are satisfied, that upon a just construction of the statute, the security offered at the trial should have been received.

The object of the Legislature was, doubtless, to secure our own citizens, and the officers of court against the prosecution of groundless or doubtful claims by, or in the name of persons living beyond the limits of the State. If, then, this object is attained by security being given at or before the trial term of the cause, there can be no reason for dismissing the suit. The object of the legislature in requiring the costs to be secured within sixty days

after notice, was in all probability, to prevent surprise at the trial. It would always be in the power of the court to prevent any injury to the defendant, if he had failed to prepare for the trial by continuing the cause. A similar decision was made by the Virginia court of appeals, in the case of Vance v. Bird, [4 Munford, 364] upon a statute like ours.

Let the judgment be reversed, and the cause remanded.

WHIDDEN v. TOULMIN.

1. The section of the act of 1807, "concerning executions, &c.," which inhibits the removal of goods and chattels, levied on by execution, from any messuage, lands, &c., leased, &c., until the payment of the money due for rent of the premises, only gives a lien for the rent due at the time of the levy, and not for what is then accruing, and to become due at some future period.
2. Where the sheriff levies process on goods of a tenant in a house leased to him, he is not liable to the landlord for its use and occupation, if the possession has not been demanded, and he merely retains the key, using the house for the safe-keeping of the goods...the lease continuing during all the time of the sheriff's occupancy.

WRIT of Error to the Circuit Court of Mobile.

This was an action on the case, by the plaintiff in error, to recover damages of the defendant. 1. Because, as sheriff of Mobile, he levied on certain goods, &c. in a store house which the plaintiff had rented to George Harrington and Noah Harrington, and refused, on demand, to pay to him the rent due. 2. Because he unlawfully detained and kept possession of the store for several months.

Among other facts, it was agreed by the parties, 1. That the plaintiff leased to Geo. Harrington, a store house in the city of Mobile, for one year, commencing on the 1st November, 1835, at a rent of two thousand dollars *per annum*, payable quarterly, viz: on the first days of February, May, August and November. On the 4th of June, 1836, two attachments in favor of Judson and

Hoppin v. George Harrington, were levied on the goods in the house, being part of a stock which the lessee had been there selling. The rent due for the two first quarters, had been previously paid, and the plaintiff gave notice to the defendant previous to the sale under his levy, that he had a lien, in law, upon the goods seized, for the rent due, and claimed a priority over the attachment. *Further*, it was admitted that the goods sold for a sum more than sufficient to pay the plaintiff's demand. 2. That they were kept by the defendant, in the store house, until the 19th of August succeeding the levy; and after the sale, the house was closed by the defendant, who retained the key until the 27th September following, when he returned it to the plaintiff's agent.—The court charged the jury, that these facts did not entitle the plaintiff to recover for either of the causes stated. Thereupon, a verdict was returned for the defendant, and a judgment rendered accordingly.

Adams, for the plaintiff in error, cited Clay's Dig. 210, 506:—Also, the act of January, 1834: "The more effectually to secure the collection of rents in the city of Mobile." 3 Thomas' Co. 209; 6 Price's Rep. 19; 1 M. & S. Rep. 145; Com. Dig. 392; 5 Binn. Rep. 506.

Campbell, for the defendant, referred to 2 Strange's Rep. 782; 1 Price's Rep. 274; 1 M. & S. Rep. 245; 18 Johns. Rep. 1; 3 Wend. Rep. 450; 17 id. 38; 2 Hill Rep. 380; 3 J. J. Marsh. Rep. 482; 2 Dana's Rep, 210.

COLLIER, C. J.—The question of the plaintiff's right to be paid his rent previous to the removal of the goods levied on by the defendant, depends upon the construction of the 35th section of the act of 1807, "concerning executions, and for the relief of insolvent debtors." [Clay's Dig. 210.] That section provides, that the goods and chattels being in or upon any messuage, lands and tenements, leased, &c. shall not be liable to be taken by virtue of any writ of execution, on any pretence whatever, unless the party so taking the same shall, before the removal of the goods from such premises, pay or tender to the landlord or his agent, all money due for the rent of the premises "at the time of taking such goods or chattels in execution: "*Provided, nevertheless,*

that such rent arrears do not amount to more than one year's rent, &c." This enactment is substantially a transcript of the 8 Ann. ch. 14, and the decisions touching the interpretation of that statute, are directly in point. In Hoskins v. Knight, [1 M. & S. Rep. 245,] the question was, whether the landlord was entitled to demand of the plaintiffs in execution, payment of rent which accrued after the time of the levy, and during the continuance of the sheriff's possession. The court held, that the terms of the act expressly pointed to the time of the taking, and shewed that the legislature contemplated one case only, in aid of the landlord, viz: to prevent an execution from taking away what is due for rent at the time when the seizure is made; but the statute was not to be extended beyond its literal meaning. See, also, Gwilliam v. Barker, 1 Price's Rep. 274, and Trappan v, Morie, 18 Johns. Rep. 1, in which the law is laid down in equivalent terms.

In Binns v. Hudson, [5 Binn. Rep. 505.] the same question was raised upon a statute analagous to our own. Tilghman, Chief Justice, in delivering the opinion of the court, remarked, that if the question were *res integra*, he should incline to the opinion, that the landlord could claim no rent which was not actually due at the time of the levy: But as it had been determined by his predecessors, that the growing rent may be apportioned, so that the landlord shall have it down to the time when the goods were taken by the sheriff; and as such construction had been uniformly followed, he thought it best to adhere to precedent. This case is worth nothing as an authority without the State in which it was determined; for the decision is not the result of the investigation of the court which made it—it is the mere echo of precedent, not approved, though acquiesced in. We think the English construction of the statute of *Ann*, lays down a rule more reasonable in itself, and consonant to principle; and to it we are willing to conform.

The facts agreed show, that at the time of the levy, no rent was due, but that so much as was due for the quarter preceding, had been fully paid. In this view of the case, the plaintiff cannot, with propriety, say that the defendant has deprived him of his lien, which the statute secured; for it is clear, that no lien had attached in his favor, if the view taken is correct.

In respect to the second question, we think that the facts stated in the record, do not entitle the plaintiff to recover for the un-

reasonable detention of his house. The defendant in attachment was the lessee for twelve months, near five of which were unexpired at the time of the levy, and the defendant retained the key for two or three months, using the house for the safe-keeping of the goods which he found in it. It does not appear, that during all this time, the plaintiff demanded the possession, or otherwise asserted a right to it. Under these circumstances, the defendant might very well have concluded, that the plaintiff was willing to acquiesce in the continuance of the lease, until the expiration of the period stipulated; in fact, if it were competent for him to do so, that he did not wish to terminate it sooner. The defendant then, cannot be charged with damages upon the second ground alleged against him.

The consequence is, the judgment of the circuit court is affirmed.

MAY, EX'R, v. LONG.

1. When an issue is made, upon the notice issued in a summary proceeding, by one surety against the executor of his co-surety, and a verdict is found by the jury, this is a sufficient action by the defendant and the court, to make the notice a part of the record, and if its allegations are sufficient to sustain the summary jurisdiction, it is unnecessary for the same averments to be repeated in the judgment entry.

WRIT of error to the Circuit Court of Sumter county.

The record discloses, that this suit was instituted in the county court of Sumter county, and thence was transferred to the circuit court, because the judge of the county court was of counsel for one of the parties.

The judgment recites the coming of the parties by their attorneys, the empanneling of the jury to try the issue joined, and their verdict for the plaintiff, assessing, also, his damages; for which judgment was rendered, to be levied *de bonis testatoris*.

In the transcript is found a notice to Patrick May, executor of the last will and testament of Mumford Lawson, deceased. This recites, that judgment had been previously obtained in the county court of Sumter county, by Patrick May, administrator of Warham Easley, deceased, against John Armstrong and William Long, the latter being security for the former. That execution issued on the judgment, and was satisfied by Long. That Armstrong, who was the principal obligor upon the note for which the judgment was obtained, had become, and was then, insolvent. That Mumford Lawson (since deceased) signed the said note as a co-surety with Long, and was jointly and severally bound for its amount in his life time with Long, though not sued. That May was duly qualified as the executor of Lawson. It then proceeds to notify May, that Long, on a certain day of the next term of the county court, would move the court for judgment against him, as executor of Lawson, for his respective share and proportion of the said judgment.

In the circuit court, the following motion was entered on the rule docket:

"William Long v. Patrick May, Ex'r.—Motion for judgment against the defendant as the executor of the last will and testament of Mumford Lawson, deceased, for a rateable proportion of a debt paid by the plaintiff in this motion to the administrator of Warham Easley, and more particularly set forth in the motion on file."

May prosecutes the writ of error, and here assigns:

1. That the judgment entry does not disclose that the motion was made in the court in which the original judgment was rendered.

2. The judgment entry does not disclose that the original judgment was founded upon an instrument on which this motion could be made.

3. That the judgment entry does not disclose that the principal debtor had become insolvent.

Inge, for the plaintiff in error cited Clay's Digest, 531, § 4; Levert v. Planters' & Merchants' Bank, 8 Porter, 107; Bates v. Planters' & Merchants' Bank, 8 Porter, 99; Curry v. Bank of Mobile, 8 Porter, 373; Brown v. Wheeler, 3 Ala. Rep. N. S. 287.

No counsel appeared for the defendant in error.

GOLDTHWAITE, J.—The practice in these summary proceedings has been, to consider the notice as in the nature of a statement of the cause of action, whenever its merits were questioned on demurrer; and to permit it to be pleaded to, whenever the defendant demanded an issue to be tried by a jury. This practice is distinctly recognized in McMahon v. Kyle, [9 Porter, 597,] Bondurant v. Woods, [1 Ala. Rep. N. S. 543,] Hallett v. Lea, [3 ib. 28,] and, doubtless, has prevailed from a very early period, growing out of the necessity for an allegation by the plaintiff before any issue could be formed. By the act of demurring or pleading to the notice, it is made a part of the record, and must necessarily be looked into to ascertain whether the action of the court on it has been correct or otherwise. When the notice has thus assumed the character of the plaintiff's allegation, and is denied by the defendant, or, indeed, admitted by a special plea, it must be considered as concluding the defendant, to the same extent as a declaration in an ordinary suit at common law. There are, however, a class of these motions, in which the jurisdiction of the court is necessary to be sustained by an act which does not enter into the liability of the defendant, and which is not necessary to be stated in the notice. We speak here of bank motions, when the certificate of the president is a necessary part of the record; and it is to this class that the remarks in Curry v. Bank of Mobile, [8 Porter, 360,] are peculiarly applicable.

The notice in the present case contains a precise allegation of every fact and circumstance necessary to invest the court with the jurisdiction of the motion under the statute. [Clay's Digest, 531, § 3 & 4; 533, § 12.] Indeed it is not pretended the allegation is defective; but it is insisted, that the averments contained in the notice ought to have been carried into the judgment entry, and there affirmed, as appearing to the court. The course insisted on as proper, under the circumstances of this record, would encumber it with two allegations precisely the same in effect, and would then have been verified, not only by the jury finding the issue for the plaintiff, but also by the court, in declaring the same facts were shown to it.

Here, then, is a verdict upon an issue, and no issue could have been found for the plaintiff on his allegations, which does not have the effect to conclude all the issuable facts alleged. Notwithstanding this, if the facts, as alleged, did not make out the juris-

diction of the court, it was competent for the defendant to show the defect, and have the advantage of it here. There may be expressions, and in some of our opinions upon cases of this description, which may have led the bar to an impression, that the jurisdiction of the court was necessary to be sustained by the judgment entry, when the intention was to speak of the record only. In the case of a judgment by default, it is the proper course to show the jurisdiction in that entry. [Smith v. Branch Bank at Mobile, January Term, 1843.] Where there is a verdict, the jurisdiction must be concluded from the record; but when the facts stated in the notice, or suggestion of the plaintiff, are affirmed by the verdict, that will be sufficient in itself to sustain the jurisdiction; unless, as in bank motions, some other matter is essential to sustain the jurisdiction, such as the certificate of the president, or extrinsic and not issuable matter.

We may remark, that no question is here made, whether the personal representative of a co-surety is liable to be pursued by this summary remedy; nor is that point raised on the assignment of error. Therefore, we have not considered it.

From this view, it is apparent, there is nothing to reverse the judgment; and it is, therefore, affirmed.

BLANN, Guardian, v. GRANT, Adm'r.

1. The county court has not jurisdiction to order a sale of lands, for the purpose of more equal distribution, unless the petition of the executor or administrator sets forth and particularly describes the heirs of the deceased.

Error to the Orphan's Court of Dallas.

Petition by the defendant in error, to sell lands.

The petitioner alleges, that he is the administrator of one David McCord, dec'd; that the deceased died seized of certain

lands, which are described in the petition by their designation at the land office. The petition proceeds to describe the heirs of the deceased, setting forth which are minors and *femes covert*—"that said tracts of land cannot be equally, fairly and beneficially divided among said heirs," and therefore, prays a sale of the same.

The court appointed the plaintiff in error, guardian *ad litem* to the minor heirs, and directed advertisement to be made in the Selma Free Press, requiring the defendants to appear on the 2d Monday in October after, and defend against the petition.

A citation issued to the *guardian ad litem*, who appeared and answered, denying the allegation of the petition.

The depositions of two persons were taken, by which it was proved that the lands could not be equally, fairly and beneficially divided among the heirs, without a sale thereof.

The court made an order, decreeing that the land be sold.

From that decree, this writ is prosecuted by the minor heirs, by Sanford Blann, their guardian, who now assign for error,

1. The court erred in entertaining jurisdiction.
2. In decreeing a sale.

EDWARDS, for plaintiff in error.

G. W. GAYLE, *contra*, cited Clay's Dig. 224, § 16, 17, to show that the court had jurisdiction. He insisted that the writ was improperly sued out, and that the decree was not final.

ORMOND, J.—The statute under which this proceeding was had, authorises an executor, who has not power by the will to sell real estate, or an administrator, when "the real estate of such testator or intestate cannot be equally, fairly and beneficially divided among the heirs or devisees," to petition the orphans' court for a sale of the real estate, "setting out and particularly describing in such petition, the lands proposed to be sold, and the names of the heirs or devisees of such intestate or testator, and particularly stating which are of age, and which are infants or *femes covert*." [Clay's Dig, 224, § 16.]

The petition in describing a portion of the heirs, recites, that one of the intestate's daughters, Eliza, married one James B. Pond, and died, leaving an infant child. That both father and child afterwards died, but whether the child survived or died previous to its father, the petitioner does not know. That the fa-

ther has no heirs living within the knowledge of the petitioner.

This proceeding being founded on the statute, the county court cannot obtain jurisdiction so as to order a sale of the lands, unless its provisions are strictly complied with. One of its most vital and important requisitions is, that all the heirs shall be parties to the proceeding, for the plain reason, that otherwise, their right would not be barred by the decree of the county court

Now, in this petition, the facts are not set forth by which to ascertain who a portion of the heirs are. It is left in doubt whether the infant child of Mrs. Pond died before or after its father, and yet this fact must be known before it can be ascertained, who the heirs are. If the father survived his child, he became its heir, and upon his death, the descent was cast upon his heirs at law. If the child survived him, then, as it had neither father or mother, brother or sister, its interest in the estate would descend in equal parts, to its next of kin, in equal degree, both on the father and mother's side. Now, here not only are the names of the heirs not set forth and particularly described as the statute requires, but the facts are omitted to be stated, from which it could be known who are interested in the inheritance. This most material requisition of the statute to give the court jurisdiction being wanting, it had no power to order a sale of the land, and its decree directing a sale to be made must be reversed.

The objection of the defendant in error, that this was not such a final decree as a writ of error could be prosecuted from, cannot prevail. It cannot be distinguished from a decree ordering a sale of land upon the foreclosure of a mortgage which, has always been held sufficient to sustain a writ of error. As to the parties in whose names the writ is prosecuted, if defective, as supposed, it would be amended, under the statute authorising amendments of writs of error.

Let the decree of the court below be reversed, and the cause remanded, that the petitioner may, if he thinks proper, amend his petition.

THOMAS AND HOWARD, TRUSTEES, &c., v. DAVIS.

1. Where a mother, in contemplation of a second marriage, with the assent of her intended husband, makes a settlement upon her infant daughter, the settlement is not void as against the husband, or his creditors, merely because the deed by which the property is thus conveyed, disposes of a *contingent remainder* therein to a third person, without the approbation of the husband.
2. A deed, by which personal property is conveyed to trustees for the use of an infant child, is not a mortgage, deed of trust, or legal incumbrance, within the meaning of the act of 1823, "To prevent fraudulent conveyances;" and does not become liable to the debts of the party in possession, although the deed has not been recorded.
3. The second section of the statute of frauds, which declares, that a loan of personal property, accompanied with the uninterrupted possession for the space of three years, shall be fraudulent as to the creditors and purchasers of the loanee, does not apply to a case where a step-father takes and retains possession of property settled upon trustees for the use of an infant daughter, by her mother, without the trustees assent, and the latter filed their bill for its recovery within the three years, which is still in a course of prosecution.
4. Where a deed conveys to trustees, for the use of a daughter, an undivided moiety of real and personal estate, of great value, the grantor and trustees cannot assent to a division of it, through the medium of arbitrators, so as to prevent the creditors of the former, from selling, under execution, his moiety of any part of the property. But it is competent for a court of chancery to cause a division to be made, or to arrest the action of the execution, until the rights of the *cestui que trust* are equitably adjusted.

WRIT of error to the circuit court of Russell.

THIS was a proceeding under the statute for the trial of the right of property. It is shown by the record, that a writ of *fieri facias*, in favor of the plaintiff, issued on a judgment rendered by the circuit court of Russell, against William D. Hargrove for six hundred and thirty 75-100 dollars, was levied on slaves of the following names, &c., viz: Nicey, Patsey, Mary and her three children, Alexander, Ardesa and Chloe; Becky, Polita, Louisa and child, Sinda, Harriet and her three children, Lucinda, Anderson and an infant, Juliana. On the 6th of June, 1842, the defendants in error made an affidavit, that these slaves were their

property, as trustees for Mary Sowell Woolfolk, and executed a bond with surety, as required by law.

An issue was made up for the purpose of trying. whether the property levied on was subject to the satisfaction of the execution; which, being submitted to a jury, was found in favor of the claimants; and judgment was rendered accordingly.

From a bill of exceptions, sealed at the instance of the plaintiff, it appears, that he produced on the trial his execution, with the levy thereon endorsed, proved the value of the slaves in question; and that when levied on, they were in the possession of the defendant in execution, in the county of Russell, and had been for more than three years previously. The plaintiff further proved, that two other executions had issued on his judgment, the one on the first of June, 1841, and the other on the 8th March, 1842; both of which were regularly returned by the sheriff of Russell.

The claimants then adduced as evidence, a deed of gift, executed in the county of Muscogee, in the State of Georgia, on the 8th day of June, 1834, by Sophia W. Woolfolk, [now the wife of the defendant in execution); which recites, that, in consideration of the love and affection which she had for her daughter, Mary Sowell Woolfolk, and, also, the trust and confidence which she reposed in the claimants, that she thereby gave and granted unto the latter, their executors, &c., in trust for said daughter, one negro girl, named Mary, with her future increase. In addition thereto, she, in the same manner, gave one half of her real and personal estate then in the parish of St. Mary's, in the State of Louisiana. The claimants were to have and to hold the same in trust, as aforesaid, against the donor and every other person, from the date of the deed. It was, however, provided, that the property in Louisiana was to remain there as long as the trustees might think the interest of the donee required. The deed further declares, that the "property was to be used for the use and enjoyment" of the donor's daughter; and the trustees were authorized "to remove it, or dispose of it as they may think most conducive to her interest."

The deed contains an additional clause as follows: "Now, in the event that my said daughter, Mary Sowell, should die without issue, then, and in that case, I give and grant unto my nephew, Sowell W. Thweat, the said property herein-before de-

scribed, in consideration of the love and affection which I have for him."

It was proved, that, immediately upon the execution of this deed, it was delivered to Howard, one of the trustees, and, shortly thereafter, recorded in the clerk's office of the superior court of Muscogee county, in Georgia; but it was not shown, that the laws of that State required such a deed to be registered. *Further*, at the time of its execution, the donor and her daughter, the donee, resided with her brother in-law, (Thweat,) who subscribed the deed as an attesting witness. The negro girl Mary was present, but not delivered to the trustees. The residue of the property was in possession of the trustee, Thomas, in the State of Louisiana.

The claimants also proved, that, early in the year 1838, Thomas and the defendant in execution removed the property that was in Louisiana to Muscogee county, in Georgia, where the latter took it into his possession against the wishes of the trustees. They filed a bill in equity against him to injoin him from bringing it into Alabama; and, after its removal, they filed a second bill in order to recover it from him. This latter bill is still pending in the court of chancery for Russell county. There was no proof that the deed of gift had ever been recorded in the county court of Russell; although the trustees lived but fourteen miles from the court-house of that county, in the State of Georgia.

It was further proved, that the trustees and the defendant in execution, about the middle of May, 1842, agreed to a division of the property, in which the latter and the donee of his wife were jointly interested. By the terms of the division, certain negroes were set apart, by arbitrators mutually chosen, to the defendant in execution and the trustees of the donee. That the sheriff of Russell county had since sold, under executions against the former, the slaves allotted to him on the division; and that the slaves in question were some of those that were set apart to the trustees. There was no proof that the division had ever been recorded in the county court of Russell, or that it was perfected at the time it was made; but it was understood, that half of the property set apart for the donee, was to remain in the possession of the defendant in execution for further decision by the court of chancery. The suit in chancery had not been decided at the time of the trial.

The deed of gift was executed after the marriage between the donor and defendant in execution had been agreed on, and on the night previous to its consummation. The latter assented to the deed, so far as it conveyed one-half of the property therein referred to, to the donee: but did not approve of the last clause therein, which provided the manner in which the donee's share should be disposed of, in the event of her death without issue. In fact, there was no evidence that the defendant in execution was aware, that the deed contained such a clause until after his marriage.

The plaintiff's counsel prayed the court to charge the jury as follows:

1. That, although the defendant in execution may have assented to the provision made by the deed of gift for the daughter of his wife by a former marriage, yet if the last clause in the deed, which gave the donee's share to a third person in the event of her death, was inserted without the defendant's knowledge or consent, and, after the donor's engagement to marry him, it was such a fraud on his marital rights as would render the deed void as to creditors.

2. If they believe the deed of gift was executed in the State of Georgia, to make it valid in Alabama against creditors, it should have been recorded in Russell county, where the property was, within one year after the defendant removed there with it; and if it remained with the defendant for a longer period in that county, with the knowledge of the trustees, and the deed was not placed on the records of the county court thereof, it was void and inoperative as to the plaintiff.

3. If the jury believe, that the property in question was in the possession of the defendant in execution, in the county of Russell, for more than three years before the levy thereon, and the trustees, with a knowledge thereof, did not, within that time, have the deed recorded in the county court of that county, then the same became liable to satisfy the plaintiff's execution.

4. The division of the slaves, made by consent of the trustees and defendant in execution, did not divest the lien of the execution on the moiety set apart for the trustees of the donee.

The court refused to charge the jury as prayed; but instructed them,

1. If they believed the possession of the slaves by the defend-

ant in execution, was adverse to the claim of the trustees under the deed, and that while the slaves were in Georgia, they endeavored to prevent the defendant from removing them into Alabama, by a bill in chancery, and that he afterwards removed them into Russell county against their will; *and further*, that the trustees subsequently filed a bill in equity, in order to recover the possession of the slaves—then there was no necessity for recording the deed in Russell county, although the defendant in execution may have there retained their possession for more than three years previous to the levy in question.

2. If they believed that the claimants and the defendant in execution divided the property embraced by the deed, and that the portion of the latter had been sold to pay his debts, it was for them to determine the justice of condemning the other half.

For the refusal to charge the jury as prayed, and for the instructions given, the plaintiff excepted, &c.

J. E. Belser and S. Heydenfeldt, for the plaintiff in error, made the following points:

1. The clause of the deed which disposes of the property given to the donee, was made after a treaty of marriage between the donor and the defendant in execution, and must be regarded in law as a fraud upon his marital rights. The consequence is, that the entire deed is void. [Newland on Con. 425; 4 Cranch's Rep. 60; 2 Mason C. C. Rep. 478; 4 Wash. C. C. Rep. 336; Harris et al. v. Bradford, 4 Ala. Rep. 214.] This being the case, all the property embraced in the deed vested in the husband, and became subject to the payment of his debts. [1 Ala. Rep. N. S. 102; 2 id. 592.]

2. The law of this State required the deed of trust to be recorded within twelve months after the property it disposed of was removed here; and the omission to do this, as against the creditors of the defendant in execution, put an end to the rights of the donee. [Clay's Dig. 254.] The case of Swift v. Fitzhugh, [9 Porter's Rep. 58.] was determined upon a different State of facts, and is not adverse to such a conclusion.

3. But if registration was not required in one year, the possession of the defendant in execution was of such a character, as required the deed to be recorded within three years after it com-

menced, in order to preserve the donee's property in the slaves. [Clay's Dig. 254; 2 Ala. Rep. 648, 686.]

If trustees omit, through negligence to perform their duties, either by failing to have a deed recorded, or in any other respect, and a loss is thereby occasioned, they are responsible to their *cestuis que trust;* but the rights of the latter in favor of the rights of the creditors of the donor, or grantor may be lost. [1 Ala. Rep. N. S. 20.]

4. There was no such delivery of the property which was in Georgia and Louisiana, when the deed was executed, as was necessary to make it operative against the defendant in execution, or his creditors. In the absence of all proof, it will be intended, that the laws of these States must be the same as the common law of Alabama. [1 Stewt. & P. Rep. 57; 1 Ala. Rep. 52; 2 id. 653, 673.]

5. The division made of the property between the claimants and the defendant in execution, was inoperative to divest the legal title of the latter, in an undivided moiety of all the property; and of course could not defeat the lien of the plaintiff's execution. The plaintiff was no party to the division, and could not be prejudiced by it.

6. The second charge to the jury is erroneous, because it refers to them the decision of a legal question.

G. Goldthwaite, for the defendants.

1. The deed of gift was made in the performance of a moral duty, and would have been good, although the husband had not been informed of it previous to his marriage. [1 Story's Eq. 273; 7 Cond. Eng. Ch. Rep. 194.] But the defendant in execution was advised of it, and assented to it, as it respects his wife and her daughter; and thus far it is certainly good. [Scott v. Duncan, 4 Dev. Eq. Rep 403.] If the limitation over was such a fraud as would avoid the deed, a court of equity should be appealed to by the husband himself to set it aside, not by his creditors; and that court could effectuate the intention of the parties. [2 Lomax's Dig. 303 to 307; 4 Dev. Eq. Rep. 403.]

2 The possession of the property by the defendant in execution, was, in no sense, a loan or hire, and is unaffected by the statute of frauds. In fact, it was not a permissive, but an adverse

possession; and in order to preserve the rights of the donee, there was no necessity for registering the deed.

3. The division of the property, made by arbitrators chosen by the claimants and defendant in execution, was effectual to divest all the title which the latter had in the part that was allotted to the former. It was as valid for all purposes as if the division had been made by a court of chancery, and must operate retrospectively, so as to divest the lien of the execution. [3 Johns. Ch. Rep. 481.]

4. The last charge may be obnoxious to the criticism of the plaintiff's counsel, but if the partition was valid, the court should have told the jury that the property was not liable to the plaintiff's execution. In this view, the charge given is more favorable to the plaintiff than he had a right to ask.

COLLIER, C. J.—1. It may be stated, as a general rule, that where the wife disposes of her property to a third person, without the knowledge of her husband, after the contract of marriage, and before its solemnization, the transaction will be considered as fraudulent against the latter. [2 P. Wms. Rep. 274; 1 Mylne & K. Rep. 510.] But the court has sometimes taken into consideration the object of the conveyance, and the situation of the husband in point of property, and relaxed the rule. [Meigs' Rep. 142.]

In the present case, it is admitted, that the settlement made by Mrs. Hargrove, previous to her marriage, upon her daughter, was assented to by her husband; but it is insisted, that the ulterior disposition of the daughter's portion, was a fraud upon his marital rights, and so taints the transaction as to avoid it *in toto*. This conclusion, we think, cannot be maintained. It is difficult to conceive how the daughter, the innocent beneficiary of her mother's bounty, can be affected by a gift which cannot take effect until after her death; and then only upon a contingency which may never happen. The law will not indulge the presumption, that the contingent gift will ever vest in possession, but rather presumes that the property will remain with the daughter and her descendants *ad infinitum*. If, however, the vesting of the remainder depended upon no other event but the ceaseless and certain progress of time, still the rights of the first donee would be unaffected by the imputed fraud on the part of the mother.

The daughter was incompetent, in consequence of her tender years, to participate in any scheme injurious to the marital rights of the defendant in execution: and, in fact, nothing of the kind is pretended. She was entirely passive, receiving the provision which her mother made for her with the assent of an intended husband; and it is not now for the latter to object that the daughter shall claim nothing under the deed, because the mother thought proper to dispose of a contingent remainder in the same property.

But are the rights of the defendant in execution in any manner impaired, because the gift embraces a person not contemplated by him. Suppose the gift had been absolutely to the daughter, or to herself and issue, the husband might, perhaps, through his wife, if the daughter died *sole* and without issue, have become entitled to the property. Upon the death of the daughter, thus circumstanced, *if the husband have rights*, it will be competent for him to assert them, against the person claiming in remainder; but the gift to the first donee being unobjectionable in itself, must be supported. Indeed, this conclusion seems so clear, that it results from a mere statement of the proposition, and requires no argument for its elucidation.

2. The first section of the act of 1823, "to prevent fraudulent conveyances," [Clay's Dig. 255, § 4,] enacts that, "all property mortgaged, or under any deed of trust, or other legal incumbrance, which may afterwards be removed to any county in this State, shall be liable to the payment of any debts, which the holder of such mortgaged property may contract, after his settlement in such county;" unless the mortgage, &c. shall be duly recorded in the clerk's office of the county court of the county to which the property is removed within six months. Where the property is brought from another State into this, twelve months is allowed for recording the mortgage, &c. "after such settlement as aforesaid."

To bring a case within this statute, it should be shown, that the debt in question was contracted, after the settlement of the holder of "the mortgaged property" in the county to which it was removed. In the case before us, there is no proof of the time when, or how, the liability was incurred, upon which the plaintiff's judgment was rendered; and although the slaves were in the possession of the defendant in execution in the county of Rus-

sell, yet perhaps the proof is defective in not showing that he himself had settled there. But if these defects were all removed, we should say, that the deed in question, does not come within the act. The statute, as its terms indicate, was intended to apply to deeds or other legal incumbrance, by which personal property was charged with a debt or duty. True, in the present case the slaves were conveyed by the mother, in trust for her daughter, yet they cannot, according to the common acceptation of terms, be said to be "under any deed of trust." They are under no incumbrance; the right of the mother has passed from her, as fully as if they had been conveyed by an absolute deed, in which no trustees were interposed; the legal title vests in the trustees, and the equitable title in the *cestui que trust*. So that in no just sense can the slaves be said to be in any manner incumbered. The defendant in execution does not claim a right for himself, or any one else, *under a mortgage, deed of trust, or other incumbrance*, but the facts when denuded, show that he removed and retained the slaves as a mere trespasser.

But if the terms of the statute were so extensive as to embrace within its letter such a deed as the one before us, yet if it allowed of any latitude of construction, we should be strongly disinclined to apply it, so as to defeat the estates of infants, or others who are presumed to be incompetent to attend to their own interests. [Swift v. Fitzhugh. 9 Porter's Rep. 39.]

3. The second section of the statute of frauds, among other things, declares that "where any loan of goods and chattels shall be pretended to have been made to any person, with whom, or those claiming under him, possession shall have remained by the space of three years, without demand, made and pursued by due course of law, on the part of the pretended lender; or where any reservation or limitation shall be pretended to have been made of a use or property by way of condition, reversion, remainder, or otherwise, in goods or chattels, the possession whereof shall have remained in another as aforesaid; the same shall be taken as to the creditors and purchasers of the persons aforesaid, so remaining in possession, to be fraudulent within this act; and that the absolute property is with the possession; unless such loan, reservation, limitation or property, were declared by will, or by deed in writing, proved and recorded as aforesaid.'" [Clay's Dig. 255.]

The facts of this case do not come within the provisions of the

act cited. It is explicitly shown, that a bill was filed to prevent the removal of the slaves from Georgia to this State, and that after their removal, a suit in chancery was brought against the defendant in execution. for their recovery by the claimants: *And further*, that his possession commenced, and has been continued, without their assent or approbation. In Myers v. Peek's adm'r, [2 Ala. Rep. 627.] it was held, that the statute applied, "where the owner of personal property voluntarily parts with the possession to another, either with or without an express contract." Here the possession was obtained against the consent of the trustees; and if the rights of the *cestui que trust* could be in any manner affected by it under a different state of circumstances, the assertion of a claim by suit, and its continued prosecution, would bring her within the saving of the act, and serve as a substitute for registration. But, if the facts were otherwise, and the possession of the defendant in execution had actually been permitted by the trustees for three years, without suit, could his creditors or purchasers prevail against an infant?

4. It may be laid down generally, that the powers of a trustee depend upon the nature and purposes of the trust. *Under particular circumstances*, it is said, he is capable of exercising the discretionary powers of the *bona fide* proprietor; otherwise, the trust estate might be injuriously affected. The necessity of the case may demand an immediate decision, as where the *cestui que trust* is under disability, or not yet in existence, &c. "The alternative of instituting a suit for the mere purpose of consulting the court, would always be attended with considerable expense, and it may be an expense wholly disproportioned to the importance of the occasion. It is evidently in furtherance of the *cestui que trust's* own interest, that where the circumstances of the case require it, the trustee should be at liberty to exercise a reasonable discretionary power-" [Lewin on Trusts and Trustees, 412–2–3; 2 Story's Eq. 241–2–3; Willis on Trustees, 127.] It is for these reasons said to be a rule in equity, that what is compellable by suit, is equally valid, if done by the trustee *without suit.* Thus it has been held, that an executor may appropriate a legacy, where the appropriation is such as the court itself would have directed. So, where the parent is unable to maintain his child, the interest of a legacy, or where that is inconsiderable, a part of the principal, has been been applied to that purpose. [Lewin on

Trusts, &c. 413–4. The learned author last cited, remarks, "The rule, that what is compellable by suit, is equally valid if done without suit, must be received with this qualification, that if a suit has been already instituted for the execution of the trust, that takes the administration out of the trustee and transfers it to the court: the original power of the trustee is from that moment paralized, and the authority of the court must sanction every subsequent proceeding." [Id. 417.] In respect to the rule, Mr Justice Story says, it "is a doctrine requiring many qualifications, and by no means to be generally relied on for safety." [2 Vol. Eq. 510.]

It is stated as a fundamental maxim in equity, that no act of the trustees, except a conveyance to a purchaser for a valuable consideration, without notice, can vary or prejudice the rights of those beneficially interested; but the trustee will be compelled in equity to make good the trust. [Willis on Trustees, 167, 8. See also, Fletcher on Trustees, 48–9.]

The division of the joint property between the trustees of the donee and the husband of her mother, would materially affect the rights of the parties in interest, by giving a several property in one moiety to each. The purposes of the trust, it would seem, does not require, that the trustees should possess the power to assent to such an arrangement, so as to bind conclusively, their *cestui que trust*. If beneficial for her, it is possible that a court of equity might sanction their act, but without such judicial approbation, it is conceived that it could not operate as a definitive adjustment of her rights. Whether the division is prejudicial to the *cestui que trust*, is an inquiry which could not have been made on the trial of this cause; trusts are among the subjects of exclusive jurisdiction in equity, and that court is the appropriate arbiter to settle the interest of parties where they are involved. This view does not at all conflict with the idea that trustees may exercise such discretionary powers as are necessary and compatible with the trust committed to them, it only shows that their discretion is not unlimited, and in some cases where the emergency is not pressing, and the interests at stake are co-extensive with the trust itself, the trustee should seek the advice of a court of chancery. Here, the duty of the trustees, as in other cases, is to protect the property for the benefit of their *cestui que trust*, and not to relinquish

the right of the latter to a part, that her right to the residue may be confirmed; yet such is the object proposed by the division.

The execution in favor of the plaintiff, was a lien on the undivided moiety of Hargrove, upon the hypothesis, that he became the legal proprietor of the interest of his wife in the slaves; and that lien canot be defeated by the division that was made. It is wholly immaterial, so far as it respects the present case, whether his share of the property has been sold by other judgment creditors for the payment of his debts; the joint interest of the *cestui que trust* is unaffected by the change of possession. That it is competent for a court of equity to arrest all proceeding by execution, against the slaves in question, until the rights of the donee shall be settled, we think will not be questioned; and in setting apart her share, it will be most proper to assign to her those that remain in the trustee's hands, looking to those that have been sold, in order to ascertain their relative value, or to make good any deficit in what the *cestui que trust* may be entitled to on settlement.

Without a particular application of the points considered, to the questions raised upon the bill of exceptions, it is obvious that the circuit court erred in the charge given in respect to the legal effect of the division of the property. The judgment is consequently reversed, and the cause remanded.

STEELE v. LOWRY AND McGHEE.

1. When a bill is filed to restrain a suit at law, on grounds of defence which could be available at law, if sustained by sufficient evidence, and it is alleged in the bill that the facts constituting this defence can only be established by evidence from the defendants to the bill;—this is a bill for discovery merely, and on the coming in of the answer of the defendant, denying the equity, it is proper for the chancellor to dismiss the bill when he dissolves the injunction.

Writ of Error to the Court of Chancery, for the counties of Autauga and Coosa.

The case made by the bill is as follows:

About the 1st of September, 1835, James P. Lowry, then re-residing in Tennessee, and when the bill was filed, in Texas, prevailed on Steele, the complainant, and one William Lowry, to execute with him a note, under seal of that date. for $4,000, payable the 1st January, 1839, with interest at the rate of 6 per cent. per annum. James P. Lowry was principal, and the others were securities. This note was placed in the hands of James P. Lowry, for the purpose, and on the condition of enabling him to make a purchase of some slaves from McGhee. Lowry passed the note to McGhee on some other terms and consideration than the purchase of slaves, but for what precise consideration, the complainant did not know, but had been informed, and so believes, that the note was passed, either on account of previous dealings and transactions between Lowry and him, or on account of some other dealings and transactions between them at the time. When the note was given to McGhee, Lowry was indebted to him about 1,000, for the payment of which, and not for the purpose for which the note was executed by the complainant, it was transferred. McGhee knew that the note was executed for the purpose before stated, and for no other purpose, when he received it from Lowry. It was made payable to McGhee, was for the sum of 4,000 dollars, and though no part ever was paid, a credit was placed on it by McGhee, of 3,000, to make the indebtedness correspond with that of Lowry to him.

McGhee instituted a suit in the circuit court of Autauga, to recover the sum due on the note from Steele, and the bill charges, that Steele is unable to prove the facts alleged, except by the testimony of the Lowrys, and that of McGhee.

The prayer of the bill is, for an injunction against that suit, until the further order of the chancellor, and that the note may be delivered up to be cancelled, and a perpetual injunction decreed, &c.

An amended bill was afterwards filed, stating that James P. Lowry had various conversations with McGhee in relation to a purchase of slaves from him, and proffered in payment of such slaves, if the purchase should be effected, to procure the complainant to become security for 4,000 dollars, or for whatever sum the purchase should amount to. It was for this purpose that Lowry procured the complainant to become his security. It

charges, that this purpose was not effected, but the note was passed to McGhee, not in pursuance of this purpose, but on account of some previous transaction between them, and that McGhee had information from Lowry, or some other source, of the purpose for which complainant consented to give the note. It then prays that McGhee shall state what information he had on this subject, as well as from whom he had it. Also, that the particular consideration might be disclosed by him, which he gave for the note.

The answer of McGhee states, that Lowry applied to him about the 1st September, 1835, to borrow 4,000 dollars, and presented to him the note, a copy of which is exhibited in complainant's bill, upon the credit of which, he wished to obtain the loan. Respondent declined lending that sum to Lowry, but at his urgent request, did loan him 875 dollars in cash, and let him have a horse at the price of 125 dollars, on the credit of the note. At the same time, a credit of 3,000 dollars, was indorsed on the note by Lowry. The note was passed to the respondent for no other purpose than to secure him for the money thus advanced, and the price of the horse thus sold, and he was entirely ignorant when he received the note from Lowry, that any improper use was made of it, or that Lowry was violating any confidence reposed in him by the complainant. The answer fully denies all the statements of the bill which charge the taking in payment of any then existing debt, and insists on the right to recover the amount of the note under the circumstances disclosed.

On the coming in of the answer, the injunction was dissolved, and the bill dismissed.

It is here assigned as error, that the chancellor erred in dismissing the bill, when the motion was only to dissolve the injunction.

Elmore, for the plaintiff in error, insisted that the bill ought to have been retained as an original bill, notwithstanding the dissolution of the injunction. The prayer is for relief, as well as for discovery, and under this bill, the note could be called in and cancelled. [Pitts v. Cottingham, 9 Porter, 675.] Nor is the circumstance, that the note is in suit of such a nature, as to control the complainant's right to have it cancelled, if his case can be made out in equity.

GOLDTHWAITE, J.—We think the bill in this case was properly dismissed by the chancellor on the coming in of the answer of McGhee, because there is no sufficient reason to entitle it to be considered in any other aspect than as a bill for discovery, in aid of the defence to the suit at law.

The complainant expressly alleges, that he is unable to prove the facts stated by him, except by the testimony of McGhee or the Lowrys. McGhee has shown, that his evidence will not avail the complainant, and if that of the Lowrys is competent for that purpose, no reason is shown why it can not be used in the suit at law, which is against Steele only.

It is supposed, however, that this case resembles that of Pitts v. Cottingham, [9 Porter, 675] where we held that a party who was defrauded in the purchase of land, could go into equity for a rescission of the contract, and was not required to wait the action of the vendor in bringing suit on the notes given for the price of the purchase. There, the object of the bill was the rescission of a fraudulent contract, and that is one of the admitted grounds of equity jurisdiction. Here, no contract is asserted, but the complainant seeks to avoid a security, which he admits there was a sufficient consideration to support, if the possession is *bona fide.*

But the difference, which is conclusive, is that, conceding the facts to be true, which are asserted by the complainant, he is not entitled to have the note cancelled, or delivered up; because, whatever may be its effect against Steele, it is a valid security as to Lowry. We only refer to this difference between the case cited and this, to show that the decision there can have no influence, as this case is presented; for whatever defence is asserted here, is equally available in a court of law, and when the plaintiff succeeds there, the determination will be final, and equity can not afterwards interfere.

Decree affirmed, with costs.

PREWITT v. GARRETT.

1. A bond of indemnity, given by the defendants to an execution, to the sheriff, to save him harmless against the consequences of levying on and selling the property of a stranger to the judgment, for its satisfaction, is illegal, and void, and no action can be maintained by the sheriff upon it.

ERROR to the Circuit Court of Lowndes.

THIS was an action by the plaintiff against the defendant in error, and two others, on a bond of indemnity.

The declaration sets out the condition of the bond to be, that one Peter Williams had recovered a judgment against Samuel Y. Allen and Patterson Rogers; that execution issued thereon, and came to the hands of plaintiff in error, as sheriff; that Allen and Rogers pointed out a certain female slave, the property of the estate of Peter Wyatt, deceased, and directed the sheriff to levy the execution on the said slave, and expose her to sale to satisfy the execution; and that they, Allen and Rogers, and defendant in error as their surety, would indemnify and save him harmless, &c., in so doing. That he accordingly levied on, and sold the slave in satisfaction of the execution; that an action has been instituted against him for selling the slave, and damages recovered, &c.: of all which the defendants had notice. The writ not being executed on Allen and Rogers, the suit was discontinued as to them.

The defendant demurred to the declaration, and the demurrer was sustained, and judgment rendered for the defendant; from which this writ is prosecuted.

BOLLING, for the plaintiff in error, submitted the cause.

ORMOND, J.—The bond in this case was given by the defendants in execution, to indemnify the sheriff against the consequences of levying on and selling the property of a stranger to the judgment and execution, for its satisfaction. This was a promise to indemnify the sheriff against the consequences of a tres-

pass, which he was invited to commit; and, being illegal, no right of action can grow out of it.

The plaintiff in an execution may indemnify the sheriff for levying on and selling property supposed to belong to the defendant, though out of his possession, and claimed by another; but it is impossible to conceive of a case in which the property of a stranger to the judgment could be sold, at the instance of the defendant in execution, to satisfy the judgment. The indemnity being to save the sheriff harmless against the consequences of an act prohibited by law, cannot be enforced in a court of justice.

The judgment of the court on the demurrer must be, therefore, affirmed.

PAINE v. MOORE.

1. The plaintiff, defendant and J. P., composed the firm of J. & P. P. & Co.; the former being temporarily absent from the city in which the firm did business, appointed the defendant his agent to hire out his negroes, rent his houses, and collect the hire and rent of the same. All which was undertaken by the defendant, who upon the return of the plaintiff, acknowledged in writing, that there was due to the plaintiff, for monies collected from his effects, and put into the house of J. & P. P. & Co., while he was acting ashis agent from 1st March, 1837, to 1st Dec. 1838, the sum of $540 16-100 above what he had paid out for him. The partnership had no interest in the negroes and land: *Held*, that the acceptance of the writing, did not make it necessary for the plaintiff to resort to the firm for payment; but the proof entitled him to recover the amount, with interest, of the defendant, individually.

WRIT of error to the county court of Mobile.

THIS was an action of *assumpsit*, by the defendant in error against the plaintiff. The declaration was on a writing called a due bill, or promissory note, in the following words, &c., viz: "$542—16. Mobile, Dec. 13th, 1838. Due Wm. Moore, for moneys which I have collected from his effects, and put into the

house of J. & P. Paine & Co., over and above what I have paid out for him while acting as his agent, from March 1st, 1837, to 1st Dec. 1838, five hundred and forty-two 16-100 dollars.

PARKER PAINE."

To this count was added the common counts for money had and received, and collected for the plaintiff, at his special instance ank request; and, also, on an account stated for $542 16.

The cause was tried by a jury, who rendered a verdict, in damages, for the amount stated in the writing, with interest thereon; and a judgment was rendered accordingly. On the trial, a bill of exceptions was sealed, at the instance of the defendant, from which the case may be thus stated, viz:

The plaintiff read to the jury the writing declared on. It was then proved, on the part of the defendant, that the plaintiff was a member of the firm of J. & P. Paine & Co at the time the credit, mentioned in the writing, was given him. The members of the firm were the plaintiff, defendant and James Paine. James Paine and the defendant were the active partners. It was also proved, that the plaintiff was absent from Mobile during the year ——, and left the defendant as his agent to hire out his negroes, rent his houses, and collect the hire and rent of the same; that the plaintiff had eight or ten negroes thus hired out, all of whom, together with the real property rented by the defendant, had no connection with the firm. The defendant had credited the books of J. & P. Paine & Co., as stated in the writing adduced by the plaintiff. It was proved, further, by one of the defendant's witnesses, that, as the agent of the plaintiff, he called upon the defendant to collect the writing in question, and his answer was, that he was not able, or had not the money to pay the same. *Upon this evidence*, the defendant, by his attorney, prayed the court to charge the jury, that crediting the books of the firm of J. & P. Paine & Co., with the amount sued for, was a payment of the money to the plaintiff, and the plaintiff could not recover; which charge was refused. The court charged the jury, that, if they believed the defendant was the agent of the plaintiff, and collected the hire of his negroes and rent of his houses, and credited the books of the firm with the amount thereof, without the plaintiff's knowledge or consent, such a credit would not prevent the plaintiff from recovering in this case. The defendant further prayed the court to charge the jury, that the writing described in

the declaration, was not a promissory note, and, from the proof, a suit at law could not be maintained upon it. This charge was refused by the court; and the jury were instructed, that a suit might be maintained upon the writing.

DARGAN, for the plaintiff in error.
CAMPBELL, for the defendant.

COLLIER, C. J.—The writing declared on, is an acknowledgement by the defendant, that there was due to the plaintiff the sum expressed upon its face, being so much money belonging to the latter, which the former had collected and put into the house of J. & P. Paine & Co. It is insisted, that the plaintiff, by accepting this paper as an evidence of his demand, impliedly admits that the defendant has properly placed the money in other hands, and that the plaintiff will look to the depositories for its payment. Such is not the legitimate interpretation of the writing. At most, the admission can concede nothing more than that the defendant has put the plaintiff's money in "the house of J. & P. Paine & Co." Whether it has been placed there under such circumstances as would relieve the defendant from liability to pay it, is a question, aside from the paper, to be solved by extrinsic proof.

It cannot be admitted that it is competent for a debtor, against his creditor's consent, to place his liability upon others who are willing to assume it. The defendant, by collecting the plaintiff's money, became liable to pay it to him on demand, and if he has placed it in other hands, without the plaintiff's assent or acquiescence, he is still chargeable.

There is not the slightest pretence for supposing the case disclosed by the proof, is one which concerned the partnership, of which both parties were members. In its inception, it was an arrangement between the plaintiff and defendant individually; and it does not appear that any thing occurring subsequently, has given to it a different character.

In respect to the second charge, which the court was requested to give the jury, it assumed the truth of all the evidence, and called upon the court to say, that a suit at law could not be sustained by it. This was properly refused, as will be seen from what we have already said; but the court instructed the jury,

"that a suit might be maintained on the instrument." Whether, without additional proof, the plaintiff could have recovered on the writing, it is not necessary to consider. The general remark of the court, it is obvious from the charge asked, was only intended to declare that the paper, assisted by the proof, would authorize a verdict for the plaintiff.

This view is decisive of the case: the consequence is, the judgment of the county court is affirmed.

KENUM v. HENDERSON.

1. In an appeal case, where the judgment is for a less sum than twenty dollars, it is error to render a final judgment by default, unless the debt is ascertained by a writing. In other cases, the facts must be examined by the court, and its judgment given on them.

WRIT of error to the Circuit Court of Benton county.

THIS suit was commenced by Henderson against Kenum, in a justice's court, and Kenum appealed to the circuit court. No declaration or statement is on file, nor is there any matter disclosed in the transcript to induce a presumption that the suit is founded on a writing ascertaining the amount of the debt. A judgment by default was taken, and a writ of inquiry awarded at one term; but this was afterwards set aside, and a judgment final was entered, as on default, for 18 61-100 dollars, besides costs; but it does not appear that the facts, upon which the defendant was charged, were passed on by the court.

This judgment is now assigned as error.

S. F. RICE, for the plaintiff in error.
W. B. MARTIN, *contra.*

GOLDTHWAITE, J.—There is nothing shown here by

which the judgment can be sustained. It is true, the judgment is for a less sum than 20 dollars, and, therefore, no pleadings were necessary; but a court is not authorized, in such a case, to give a final judgment without considering the facts any otherwise than it would be in a suit for a greater sum.

If the debt, is ascertained by a writing, the judgment by default, whatever is the sum, may be final; but, when it is not, the damages must be ascertained by a jury, if for more than 20 dollars, and by the court, if for a less amount.

Let the judgment be reversed, and the cause remanded.

WATSON, Adm'r. v. MAY.

1. A stranger to a judgment or decree of the orphans' court, cannot carry it by *certiorari* to the circuit court; and if the circuit court should determine on the errors assigned, its judgment will be reversed and remanded, that the order granting the *certiorari* may be quashed; and this may be done on the application of the party at whose instance the cause was removed into the circuit court.

Error to the Circuit Court of Sumter.

The defendant in error, as administrator of one Easly, made a settlement of the estate with the Judge of the county court of Sumter, by which it was ascertained that the administrator had paid out for the estate beyond the amount of assets received by him, the sum of $1,650 89, and for this sum, a judgment was rendered in his favor. Subsequent to this, he resigned his administration, and the plaintiff in error was appointed administrator *de bonis non* of the estate.

Execution having issued on the judgment, in favor of May against the administrator *de bonis non*, he presented a petition to the Judge of the circuit court, praying an order for a *certiorari*, to bring up the cause, and for further relief.

The judge having granted the petition, the record was removed into the circuit court, where the plaintiff in error assigned for

error, 1. The rendition of the judgment in favor of May. 2. That no order or publication for a settlement was ever made in said cause.

The court reversed the judgment rendered in favor of May, but affirmed the judgment in all other respects. From this judgment, the plaintiff in the circuit court prosecutes this writ of error.

Boyd and Cornick, for plaintiff in error.
Lyon, *contra.*

ORMOND, J.—The judgment of the orphan's court in favor of May, if available for any purpose, certainly could not in any manner affect the plaintiff in error, who was no party to it. The execution, which it appears issued on it, it is true, was wholly unwarranted, and should have been superseded, and quashed by the court out of which it issued. Beyond this, the plaintiff in error was not injured, and had no right to intermeddle with it.

It follows, necessarily, that as the removal of the record into the circuit court was, on the application of a stranger to the judgment, that the circuit court did not obtain jurisdiction, and had no right, either to reverse or affirm the decree of the county court.

It is conceded, that the orphans' court had no power to render a judgment in favor of May, but it is insisted, that the settlement made by the court, ascertaining a balance due him, is conclusive of that fact. How far that settlement is binding on those interested in the estate, depends altogether on the fact, whether it was made according to law, a question which, although argued, this court has no power to settle, as it cannot take jurisdiction of the case.

The case of Merrill v. Jones, [8 Porter, 554.] is in principle, like this. There, the circuit court had entertained an appeal from an interlocutory order of the county court, and affirmed its judgment, from which judgment a writ of error was prosecuted to this court, and this court reversed the judgment of the circuit court, although the appeal and writ of error were prosecuted by the same person, on the ground that such a judgment, if permitted to stand, would operate as a bar to a review of the same matter, when presented on error or appeal, after a final judgment.

So, in this case, if the judgment of the circuit court, affirming

the settlement of the county court, is permitted to stand, it might operate as a bar to an inquiry into its validity, when sought to be enforced against the estate of the deceased, or those interested in it.

In proceeding to take jurisdiction of the cause at the instance of a stranger to the judgment, and in determining on the errors assigned, the circuit court erred, and its judgment is therefore reversed, and the cause remanded, that the order granting the *certiorari*, may be quashed, as having improvidently issued.

BANK OF THE STATE OF ALABAMA v. WHITLOW.

1. The indorser of a bill of exchange, being sued on his indorsement, pleaded that the bill was made to be negotiated to the plaintiff; that the consideration of the defendant's indorsement was the previous deposit, by the drawer, of ten bales of cotton in the ware-house at D; for which, at the time of the negotiation of the bill, he gave the plaintiff the receipt of, or order upon, the ware-house keeper. *Further*, that the cotton was of the value of one thousand dollars; that the plaintiff agreed with the defendant to take and sell the same, and apply the proceeds thereof to the discharge of the bill before the defendant should be called on to discharge any part of it—All which the plaintiff has failed to do: *Held*, 1. It cannot be assumed, that the arrangement between the plaintiff and drawer, was not in writing. 2. That the plea would tolerate the admission of evidence to bar the action; though it might, perhaps, be competent for the plaintiff to show the removal or destruction of the cotton, so that it could not be obtained.
2. The protest of a notary public is admissible evidence, in an action on the bill of exchange to which it refers, although a witness may testify that he is acquainted with the notary's hand-writing, and does not believe the signature to the protest was written with his hand.

WRIT of Error to the County Court of Tuskaloosa.

This was a proceeding by notice and motion, under the statute, at the suit of the plaintiff in error against the defendant, as the indorser of a bill of exchange drawn by R. J. Inge, at Tuskaloosa, on the 1st of October, 1838, for the sum of five hundred dollars,

payable at twelve months after date. The defendant pleaded, 1. *Non assumpsit.* 2. That the bill in question was made to be sold to the plaintiff, under the terms and regulations under which the Bank agreed to advance their bills upon cotton, to wit, "upon the 23d of October, 1838, at the place, &c." that the defendant indorsed the bill at the request, and for the accommodation and exclusive benefit of the drawer; of all which the plaintiff had notice at the time of its purchase, at, to wit, &c. That the consideration and inducement of the defendant to indorse the bill was, that the drawer had before that time, to wit, on the 23d of October, 1838, deposited ten bales of cotton in the ware-house at Demopolis, and at the time of the negotiation of the bill, gave the plaintiff the receipt of, or order upon the ware-house keeper, for the same. It is then alleged, that the cotton was of the value of one thousand dollars; and further, that the plaintiff agreed with the defendant to take and sell the same and apply the proceeds thereof to the discharge of the bill before the defendant should be called on to discharge any part of it—all of which the plaintiffs have failed to do; and the defendant is ready to verify, &c. On the first plea, the plaintiff took issue, and to the second he demurred; his demurrer being overruled, he replied, that although it was agreed to take and receive of the drawer of the bill, the cotton in the plea mentioned, yet when the time had arrived for the demand and delivery of the same, it was demanded according to order of the ware-house keeper, and a delivery refused, &c. Issue being joined upon the replication, the cause was submitted to a jury, who returned a verdict for the defendant, and judgment was thereupon rendered. From a bill of exceptions sealed at the trial, it appears, that in order to prove the fact of the protest of the bill of exchange upon which the action is founded, the plaintiff offered in evidence, a formal protest signed thus, "J. H. Adams, Notary Public." It appeared that a seal of metal, or other hard substance, had been impressed upon the paper about the place where notaries usually put their seals to such official acts; but the entire device of the seal was not legible. The defendant then proved, by a witness, that he had seen the notary, J. H. Adams, who is now dead, frequently write, and knew his hand writing, that he did not believe the signature to the protest to be in his hand writing; if it was, it was unlike what he had seen him write. To the admission of this evidence, the plaintiff objected,

but his objection was overruled; thereupon, the court excluded the protest, and plaintiff excepted, &c.

B. F. Porter, for the plaintiff in error.—The demurrer to the second plea, should have been sustained, because it does not show that the plaintiff was a party to the agreement under which the defendant indorsed the bill, and for the further reason, that the plea sets up a parol agreement to defeat a written contract.

The notarial protest was improperly excluded from the jury—the proof went merely to question the genuineness of the signature without denying the seal of the notary. But be this as it may, the court should not have taken upon itself to decide against the protest; it should rather have been left to the jury to determine upon the sufficiency of the evidence.

It is not necessary that a notary should subscribe a protest with his own hand—it may be signed by a clerk, or the signature may be printed, or even omitted entirely, if the seal is undisputed. [25 Am. Jurist, 359.]

E. W. Peck and W. Cochran, for the defendant.—The effect of the agreement set out in the second plea was, to place the cotton under the control of the Bank, and whenever the ware-houseman's receipt was delivered to the plaintiff, the pledge became complete. If the cotton was not delivered on demand, the plaintiff should have proceeded against the ware-house keeper, and cannot charge the defendant until this remedy has been pursued. The Bank gave no notice of the refusal to deliver the cotton, and made no effort to rescind the contract for its shipment; and it must be considered as still continuing.

The duties of a notary cannot be performed by a clerk or other person; and it is not only necessary that he should seal a protest, but he must sign it also. [The Onandaga county Bank v. Bates, 3 Hill's Rep. 53.]

COLLIER, C. J.—1. It was not necessary that the defendant should have participated in the arrangement made in respect to the cotton, between the plaintiff and the drawer of the bill. The bill was negotiated by the bank at the instance of the drawer; and although the legal title is deduced immediately through the defendant, he never received value for it, and may

set up any defence arising out of the circumstances under which it was acquired.

We cannot assume that the transaction between the plaintiff and the drawer, in respect to the cotton, was verbally made. It was not necessary for the plea to be explicit on this point, but it was entirely competent to state the facts without reference to a writing, and then introduce the written evidence, if it exist.

The second plea substantially alleges, that the plaintiff received the receipt of a ware-house-man at Demopolis, for ten bales of cotton deposited in his ware-house, previous to the negotiation of the bill, by the drawer; that the cotton was of the value of one thousand dollars; the plaintiff agreed with the defendant to take and sell the cotton, and apply the proceeds thereof to the payment of the bill, before he should be called on for the payment of any part of it—all which, the plaintiff had failed to do. This plea would admit proof, which in the absence of countervailing evidence, would furnish a bar to the action, and was, therefore, rightly sustained. But, whether it would not be competent for the plaintiff to show the destruction of the cotton, its removal by either the drawer or the defendant, or by some one having a paramount claim, in the present aspect of the case, it is unnecessary to consider.

2. Treating of the evidence necessary to authorise a recovery against the drawer or indorser of a bill, Mr Chitty says, "A protest apparently under the seal of a notary public, and made abroad, need only be produced, and proves itself without showing by whom it was made." [Chitty on Bills, 9 Am. ed. 642.]—At the common law, the protest of an inland bill was not evidence in itself, but required proof to establish the facts recited in it.—But, in this respect, there is no difference in this State between a foreign and an inland bill. The statute declaring, that the protest of a notary of an inland bill of exchange, or other protestable security, setting forth a demand, refusal, non-acceptance, or non-payment, and that notice thereof was given, either personally or otherwise, to the parties entitled thereto, shall be evidence of such facts. [Clay's Dig. 87, § 51, 380, § 9.] The protest in the case at bar, is apparently subscribed and sealed by a notary, commissioned, and resident in this State, and whose official character we must judicially know; and according to the law laid down by the learned author we have cited, it was admissible evidence.—

Upon the protest being read to the jury, it would be competent for the defendant to show, that it is not the act of the notary, whose act it appears to be. The fact that it is subscribed in the hand writing of some one else than the notary, is very unsatisfactory to prove that it is not genuine, for he may have employed an amanuensis. If the impression indicates that it was the seal he was accustomed to use, this should go far in the absence of direct and positive proof, to repel the imputation of spuriousness, whatever might be the evidence in respect to the hand writing.

The case of the Onondaga Bank v. Bates, [3 Hill's Rep. 53,] which was cited by the defendant's counsel, does not sustain the decision of the circuit court. In that case, the court merely determine, that the duties of a notary in the presentment of a promissory note, or a bill of exchange, cannot be performed by his clerk, or a third person; and that a protest stating that the notary *caused* the note to be presented, &c. was insufficient. In the case before us, we have seen that the protest is regular upon its face, and that it was improperly excluded.

The judgment is consequently reversed, and the cause remanded.

CLARK v. GAITHER.

1. Proceedings by way of garnishment, against a debtor of the defendant in execution, are irregular, if commenced by a notice from the sheriff, without being supported by the affidavit required by statute. It is not the sheriff's duty to proceed thus, and if the garnishment have no other support, a judgment by default upon it is erroneous.

WRIT of Error to the County Court of Coosa county.

The first proceeding in this cause is, a summons of garnishment, signed by J. M. C. Logan, sheriff of Coosa county, and directed to Clark. It recites, that a judgment was rendered, and execution issued in the county court of Coosa county, at the Janu-

ry term of that court, wherein Eli E. Garther is plaintiff, and Edward Camp is defendant, for the sum of 671 dollars, which execution had been placed in said sheriff's hands, to do execution thereof. It then proceeds to notify Clark to appear at the next term of the county court of Coosa county, to be held on the 4th Monday of July, 1839, to answer, &c.

At the January term, 1840, a judgment *ni si*, was rendered against Clark for want of appearance. On this, a writ of *sci. fa.* issued, returnable to the July term, 1840, which was not served, but notwitastanding, the judgment was made final.

Clark here assigns as error, that the county court erred,

1. In giving judgment when there was no affidavit to support the writ of garnishment.

2. Because there was no return of *nulla bona* upon the execution.

3. Because there was no service of the writ of garnishment.

4. Because there was no service of the *sci. fa.*

Seth P. Storrs, for the plaintiff in error.

No counsel appeared for the defendant.

GOLDTHWAITE, J.—So far as we can determine, from what appears in the transcript sent here, the sheriff seems to have considered the process of garnisheeing a debtor of the defendant in execution. as a necessary part of his duty; for the summons is issued by him, and does not apperr to be supported by any affidavit. This is entirely unwarranted by any statute, for although many enactments authorise garnishee process after judgment, or after the return of *nulla bona* to an execution, yet all require an affidavit to be made, and the writ of garnishment seems necessary to be issued by the clerk. [Clay's Digest, 259.] The garnishee process then, is irregular, and this would be sufficient in itself to avoid the judgment, but in addition to this, there was neither service of the *sci. fa.* or the return of two *nihils.*

Let the judgment be reversed.

THE BANK OF MOBILE v. HALL.

1. When the decree of a chancellor ascertains and settles the rights of the parties in litigation, it is so far *final* as to sustain a writ of error, although the chancellor may refer the cause to a master to ascertain facts for an account. It will not vary the case that proceedings were afterwards had, and new parties made for a purpose not affecting the merits, but relating merely to the account to be taken.
2. A final decree which will bar the prosecution of a writ of error, after three years is the last decree made in the cause.

ERROR to the Chancery Court of Mobile.

Motion to dismiss the writ on the ground, that the decree is not final, but interlocutory merely.

PHILLIPS, for plaintiff in error.
CAMPBELL, *contra.*

ORMOND, J.—The bill was filed by the defendant in error against the plaintiff in error, and others.

The bill, in substance, alleges the purchase, by the complainant, of one S. Andrews, of several lots in the city of Mobile, at the price of $20,000, payable in four instalments, for which notes were executed. That the first note was paid; about which time Andrews became insolvent, and absconded. That, at the time of the purchase, there was an incumbrance on the land for the sum of ten thousand two hundred dollars, secured by a deed of trust, which, although recorded, he was ignorant of. That the land was advertised to be sold under the deed of trust, and purchased in by complainant at $8,600, the amount due. That the Bank of Mobile became the proprietor of the second, and William R. Hallett of the third note, with notice of the complainant's equity.

The prayer of the bill is, that Hallett and the Bank be injoined from suing upon, or negotiating the notes, and for general relief. The bill was answered by the Bank and Hallett, and came on for hearing before the chancellor, on the bill, answers and documentary evidence, when his honor made a decree in writing; in which, after an elaborate examination of the facts and law of the

case, he determined that the complainant had the paramount equity, and refers the cause to the master to state an account between the parties.

We are unable to distinguish this case from the case of Weatherford v. James, [2 Ala. 170.] It is there said that a decree "is final when it ascertains all the rights of the parties in litigation," although there may be a reference to the master to ascertain facts for an account between the parties. That those acts are ministerial in their character, and do not affect the decree.

Such is the fact in this case. The chancellor affirms that the complainant is entitled to the equity he seeks by his bill, and the entire object of the reference to the master was, to ascertain facts to enable the chancellor to apportion the loss among the defendants. It is true, the decree is not very formal, but in a court of chancery, substance is regarded, and not form. The intention of the chancellor cannot be mistaken. The fact that costs were not awarded, is not material: such is not usually the case, until the last decree made in the cause.

The principal difficulty we have felt, arises from the proceedings had subsequent to the decree of the chancellor.

Some time subsequent to the decree, the complainant filed his petition, alleging that one Campfield held the remaining note, and had sued him thereon in the United States court; and praying leave to file a supplemental bill to make Campfield and another a party; which was granted. This supplemental bill was answered by Campfield and others; and other proceedings were had which need not be mentioned.

Although these proceedings, subsequent to the decree, and while it continued in force, were irregular, they cannot invalidate it, or render it inoperative. The object, indeed, of these proceedings was, to carry out the principles of the decree, by bringing before the court all those interested in the notes which were affected by the equity of the complainant.

It is important that litigation should end, at least in a court of chancery, as soon as the merits of a case are ascertained, and a point reached which decides the principle which must govern it.

Thus, in this case, if the opinion of the chancellor is erroneous, the delay, expense and trouble attending the ascertainment of the facts preparatory to an account, are unnecessary and profitless. The case of Kennedy's heirs v. Kennedy, [2 Ala. 471,] is, in

principle, like this. There, as here, the chancellor merely decreed, that the complainant was entitled to the equity sought by his bill, referring the complicated matter of account to the master. Yet this court did not hesitate to take jurisdiction of the case; nor was the jurisdiction questioned by the able counsel concerned in it.

A decree of the court of chancery may be final in this sense, so as to sustain a writ of error, but whilst the cause remains on the docket for any purpose, the statute barring the prosecution of writs of error, after three years from the rendition of judgment, does not begin to run. The final judgment there spoken of, is evidently the last judgment rendered, and which disposes of the entire case.

Motion denied.

JENKS v. EDWARDS, USE, &c.

1. Where a suit is brought in the name of one person, for the use of another, the defendant may plead either in bar or abatement, that the nominal plaintiff was dead *at the commencement of the suit.*

WRIT of error to the circuit court of Wilcox.

This was an action of *assumpsit* on a promissory note, in the name of Edwards, for the use of Burke & Ratcliff, against the plaintiff in error. The defendant below pleaded in bar, that the plaintiff, Edwards, ought not to have and maintain his action, because he departed this life previous to its commencement. To this plea there was a demurrer, which, being sustained, the defendant declined to plead over, and a judgment by default was rendered against him.

BETHEA, for the plaintiff in error. The plea was a bar to the action, and, as such, properly pleaded. [1 Chitty's Plead. 434, 465.]

DEAR, for the defendant.

COLLIER, C. J.—The act of 1812 enacts, that where any person shall institute a suit in the name of another, for his own use, the death of the person, in whose name the suit is instituted, shall not abate the same; but the suit shall progress, and be tried in the same manner as though it was actually brought in the name of the person for whose use it was instituted. [Clay's Dig. 313, sec. 3.] This statute only renders unnecessary the revival of the action where the nominal plaintiff dies during its pendency; but it does not authorize the institution of a suit in the name of him who appears to have the legal interest in the cause of action, if he is dead. Such a case is unaffected by statute in this State, and the personal representatives must, as at common law, be the actors of record.

It is said, whenever the subject matter of the plea or defence is, that the plaintiff cannot maintain a suit at any time in respect of the supposed cause of action, it may, and usually should be pleaded in bar; but matter, which merely defeats the present proceeding, and does not show that the plaintiff is forever concluded, should, in general, be pleaded in abatement. [Chitty's Plead. 3 Am. ed. 435.] Chitty, in treating of pleas in abatement, observes that, "Pleas to the disability of the plaintiff, showing that he is incapable of commencing or continuing his suit, either deny his existence, as that he, or one of several plaintiffs, at the time of the commencement of the suit, was a fictitious person, or dead." [Ibid.; see, also, 1 Saund. on Plead. & Ev. 2.]

Comyn lays it down, that if the plaintiff dies before the original writ purchased, the writ is abateable on plea. *Further*, a bankrupt cannot sue in his own name for the benefit of his creditors; and though, by the ancient doctrine, this might be objected to by plea in abatement, yet it should seem now to be objectionable by plea in bar only. [See 15 East's Rep. 622, and 1 Com. Dig. 60, E. 17.] Dane says the general principle is, if the plaintiff's disability to sue be *perpetual*, it is in bar, as then he never can have his action; but if it is only *temporary*, it must be pleaded in abatement. [5 Dane's Ab. 693, chap. 176, art. 4] The learned author states many cases illustrative of the principle, and some in which it is allowable to plead either in bar or abatement. Thus the defendant may plead, either in bar or abatement, that the plaintiff is an *alien enemy*, for the cause of action is forfeited; but that he is an *alien friend* is only pleadable in abate-

ment; except in real actions, where the bar is perpetual. So where *outlawry* operates a forfeiture of the cause of action, it may be pleaded in bar or abatement.

In the case of the Society for Propagating the Gospel v. The Town of Pawlet and another, [4 Peters' Rep, 480,] the court said, that if the defendants meant to insist on the want of a corporate capacity in the plaintiffs to sue, they should have interposed a special plea in abatement or bar; that by pleading to the merits, the capacity of the plaintiffs to sue, was admitted. [See, also, Yeaton v. Lynn, 5 Peters' Rep. 224.] The case cited from 4 Peters, was an action by a corporation; but it is apprehended that the same principle would apply to a suit in the name of a person supposed to have a natural existence. In The Mayor and Burgesses of Stafford v. Bolton, [1 Bos. & Pul. Rep. 40,] the court were of opinion, that if there were no such corporation, the fact might be pleaded specially in bar; but if there was a mere variance between the true name of the corporation and that in which the suit was brought, advantage must be taken by plea in abatement. Chief Justice Eyre, in that case, cited, with apparent approbation, Brooke's Ab. Misnomer, 93, which seems to consider a corporation and a natural person, in respect to the point we are considering, in the same situation.

Our conclusion from the authorities is, that where the plaintiff's disability is such that it cannot, *in rerum natura*, be removed at any time in future, the defendant may allege it either in bar or abatement. The general principle stated in all the elementary books, would seem to warrant such a conclusion, and the authorities which do not affirm it, merely determine that the death of the plaintiff, previous to the commencement of the suit, may be pleaded, without denying that a special plea in bar would not be allowed. Why should not a plea in that form be good? The nature of it is such, that it cannot give the plaintiff a better writ that he may institute another suit; and a verdict, upon an issue thus formed, against the plaintiff, will not bar an action by his personal representatives, founded upon the same cause. Upon principle, then, we think the plea relied on, in the present case, was well pleaded; and, not being opposed by precedent, the demurrer of the plaintiff should have been overruled. The consequence is, the judgment of the circuit court is reversed, and the cause remanded.

BARLOW v. FLEMMING.

1. A contract, for the sale of a horse, which is not reduced to writing, but for the price of the horse a note is given, is not affected by the rule that written contracts cannot be explained by parol evidence. In such a case it is competent to prove by parol that the note was to be returned if the horse died.

WRIT of Error to the Circuit Court of Clarke county.

Assumpsit on a promissory note. At the trial, the defendant offered evidence, tending to show, that the note sued on was given in payment of the price of a horse; that previously to writing the note, he offered to return the horse, alleging it was unsound, and for that reason, he should prefer not to keep it; the plaintiff's intestate then insisted the horse was sound, and in a thriving condition, and told the defendant to close the matter by note, agreeing with him, that if he would give the note, it should be returned if the horse died. The horse died in the possession of the defendant, within a week after the sale was made to him. On this evidence, the court charged the jury, that if there was any condition attached to the contract different and varying from the note, parol evidence of such condition could not be regarded, but if there was such a condition, it ought to have been introduced into the note. The defendant requested the court to instruct the jury, that should they believe it was agreed between the defendant and the plaintiff's intestate, at the time when the note was given, it should be returned if the horse died, then it was without consideration and void, and the plaintiff ought not to recover. This charge being refused, the defendant excepted, as well to the charge given as that refused, and judgment having been rendered on a verdict against him, assigns the same as error.

BLOUNT, for the plaintiff in error.
No counsel appeared for the defendant.

GOLDTHWAITE, J.—In this case, it is certain, the circuit court was in error, with respect to the application of the rule, that a written contract cannot be varied by parol evidence. The

note given as the price of the horse, does not, necessarily refer to the contract of sale, or contain any of its terms. In itself it is a mere promise to pay. and its consideration was a proper subject of inquiry, whether shown by parol or in writing. If the contract respecting the horse had been reduced to writing, then parol evidence would be incompetent; but as it was entirely verbal, the mere execution of the note furnished no ground for the application of the rule. [Cowen & Hill's notes, 10 Phil. Ev. 1473.]

Judgment reversed, and remanded.

LIVINGSTON v. LUCAS.

1. A defaulting witness, in a civil cause, may, upon *scire facias* excuse himself for his failure to attend in obedience to the *subpœna*, by his own oath.

ERROR to the Circuit Court of Montgomery.

HARRIS, for the plaintiff in error submitted the cause.

ORMOND, J.—The single question presented by the record is, whether a witness in a civil cause, against whom a judgment has been rendered for failing to appear in obedience to the *subpoena*, can, upon *scire facias*, be admitted as a witness, to excuse himself for failing to attend.

The statute, which imposes the penalty of one hundred dollars upon defaulting witnesses, contains a proviso, "that if sufficient cause be shown by the person so summoned, and failing to appear, of his or her incapacity to attend at the time and place mentioned in the *subpoena*, no forfeiture or penalty shall be incurred by such failure." [Clay's Dig. 599, § 2.]

It is, by no means, a forced construction of this act, that it was intended that the party might, by his own oath, excuse himself for his failure to attend in obedience to the *subpoena*. The penalty incurred is in the nature of a fine for the contempt of the

process of the court; and, as he is subpoenaed at the mere suggestion of the party desiring his testimony, it is certainly not unreasonable, that he should be allowed to excuse himself by his own oath for his omission, the more especially, as the omission may have been produced by causes known only to himself. This view derives strength from the fact, that the statute makes the witness liable, in addition to his forfeiture, to an action, at the suit of the party calling him, for the full damages which may have been sustained by the want of his testimony; and, in such action, he certainly could not be a witness for himself, but would be compelled to prove his excuse by indifferent testimony. Such has been the uniform construction put upon the statute, and that, of itself, would be sufficient, in a doubtful case, to cast the scale.

Let the judgment be affirmed.

GRIFFIN v. GANAWAY.

1. In an action against a sheriff for failing to levy an attachment on a sufficiency of the property of the defendant therein, the declaration alleged that a *venditioni exponas* had been placed in the sheriff's hands, requiring him to sell so much of the estate which he had been commanded to attach, as was of value sufficient to satisfy the judgment and costs rendered in that suit: *Held*, that so much of the declaration as related to the *venditioni exponas*, might, if necessary, be rejected as surplusage; and an averment that the plaintiff had sustained damage to a greater amount than the debt sought to be recovered, was under the act of 1824, equivalent to an averment that the same was unpaid.
2. Where, in an action for failing to levy an attachment on a sufficiency of property to satisfy the debt, the declaration correctly describes the proceedings, as to parties, date of attachment, and amount of judgment rendered therein, the variance of *a quarter of a cent* between the description in the declaration and the attachment, does not authorise the exclusion of the latter as evidence.
3. An action against a sheriff for failing to levy process, cannot be supported by proof that the money had been collected by him.

WRIT of error to the County Court of Talladega.

This was an action on the *case*, at the suit of the defendant in error, to recover damages of the plaintiff, for the failure to levy an attachment placed in his hands as sheriff, on the 27th of October, 1841, in favor of the former, against the estate of Shelton Kennerly, on a sufficiency of property to satisfy the same. The declaration, after reciting the proceedings had on the attachment, avers, that, on the 28th of January, 1842, a *venditioni exponas* was regularly issued on the judgment rendered in that case against Kennerly, in favor of the plaintiff below, and was placed in the hands of the defendant, as the sheriff of Talladega, on the 2nd of February next thereafter, commanding him "to sell so much of the estate of said Ganaway, (which, by the aforesaid writ of attachment, he had been commanded to attach and secure, &c.,) as would be sufficient to satisfy said judgment and costs. It is alleged, that Kennerly had in his possession a sufficient estate in the county of Talladega, which the defendant might have attached, to satisfy the demand of the plaintiff; yet the defendant, not regarding his duty, &c., did not, nor would at any time before the return day of the attachment, attach and secure so much of the estate of Kennerly as was of value sufficient to satisfy the debt and costs, &c. To this declaration the defendant demurred, and his demurrer being overruled, he pleaded: 1. The general issue; 2. *Nul tiel* record; 3. That the attachment was levied on all the property of Kennerly which, with due diligence, could be found; 4. The property levied on was perishable, and of value sufficient to satisfy the attachment, but the plaintiff failed to obtain an order to sell the same within a short time after the levy, as he might have done, and by such failure, the property became insufficient to pay the amount for which the attachment issued. Issues being joined on these pleas, the cause was submitted to a jury, who returned a verdict in favor of the plaintiff for ninety-nine 85-100 dollars, and a judgment was rendered accordingly.

On the trial, the defendant excepted to the ruling of the court. The bill of exceptions shows: 1. That the plaintiff read, as evidence to the jury, a writ of attachment, corresponding in date with that described in the declaration, but in which the debt sought to be recovered, appears to be one quarter of a cent more. 2. The court permitted the plaintiff to give in evidence two attachments, issued on the 30th October, 1841, at the suit of

other parties against Kennerly, which appeared to have been satisfied. Further, he read to the jury an entry made on the trial docket of the court, at its term holden in January, 1842, by the defendant, as follows: "Norvell Ganaway v. Shelton Kennerly. Settled in full, 21st December, 1841. D. A. Griffin, sheriff;" although there was a pencil mark drawn through the lines and over the defendant's signature. The judge, in his charge to the jury, excluded from them, for all purposes, except to show a want of due diligence by the defendant, the entry on the trial docket.

S. F. Rice, for the plaintiff in error. The demurrer to the declaration should have been sustained: 1. Because it is not alleged that the *venditioni exponas*, issued for the sale of *Kennerly's* property, was unproductive; 2. It is not averred positively, that the plaintiff has not been paid his debt and costs, but there is a mere general conclusion that *he is injured, &c.*

The variance between the attachment described in the declaration, and that adduced, was such as to make it inadmissible evidence. [Johnson v. Gray, at this term.] The attachments in favor of the other plaintiffs were irrelevant, and should have been excluded from the jury.

The entry read from the trial docket was foreign to the issues, and should not have been received, even if it had not been obliterated; and the remark of the judge to the jury, instead of removing the objection to it, places it in a still stronger point of view.

L. E. Parsons, for the defendant in error. The objections to the declaration are unavailable. A general objection to documentary proof, will not be sustained; but it should be particularized. [Harrison v. Davis, 2 Stewt. Rep. 354.] But the variance between the declaration and attachment is too inconsiderable to have authorized the rejection of the evidence. [5 Johns. Rep. 89.] If the court erred in permitting the entry to be read from the trial docket, the error was cured by what was said to the jury.

COLLIER, C. J.—1. The declaration is not drawn with that technical precision which the plaintiff should always employ in stating his cause of action; but since the act of 1824, "to regu-

late pleadings at common law," [Clay's Digest, 334. § 119.] has removed all objections, which are merely formal, to the pleadings in a cause, by declaring that, "no demurrer shall have any other effect than that of a general demurrer," we think the declaration was very correctly adjudged to be sufficient. It is not alleged that the attachment was ever levied; this can only be inferred, if at all, from the allegation that a *venditioni exponas* was issued and placed in the sheriff's hands, commanding him to sell so much of the property of the defendant in that suit, (which he was directed to seize and secure by the attachment,) as would be sufficient to satisfy the judgment and costs. The *gravamen* of the charge is, that, although the defendant in the attachment had property in his possession of sufficient value to pay the debt sought to be collected, together with costs, yet the defendant in this action would not, according to the mandate of the writ, levy the same on property sufficient for that purpose, as he might and ought to have done: whereby the plaintiff is injured, &c. To have entitled the plaintiff to recover, it was not necessary that he should have proved that a *venditioni exponas* had been placed in the sheriff's hands. The proof of this allegation was wholly immaterial. It might have been stricken out without affecting, in any manner, the cause of action; and was, therefore, properly disregarded by the circuit court. [1 Saund. Plead. & Ev. 113–4, 340.]

The averment, that the plaintiff was injured, and had sustained damage to a greater amount than that sought to be recovered by the attachment, is equivalent to an allegation that his debt is unpaid, when considered in reference to the influence of our healing statute already cited.

2. The plaintiff did not attempt to set out the attachment *in haec verba*, but merely to describe it by its substance and effect. It is in such case ordinarily sufficient, if the legal identity of the instrument has been adhered to; and there will be no variance, if the writing proved, and that alleged, correspond in all essential particulars. [Pearsall v. Phelps, 3 Ala. Rep. 525; 2 Phil. Ev. C. & H.'s notes, 520—7.] Does the mere difference of one quarter of a cent so materially change the identity of the attachment, when the description, in other respects, is in perfect harmony with the allegation, as not to permit it to be read as evidence to the jury? [Bissell v. Kip, 5 Johns. Rep. 89; Bibbins

v. Noxon, 4 Wend. Rep. 207; Webb v. Alexander, 7 id. 281; Thompson v. Jameson, 1 Cranch's Rep. 282; United States v. Lakeman, 2 Mason's Rep. 229; United States v. McNeal; 1 Gall. Rep. 387; Rex v. Coppard, 3 C. & Payne's Rep. 59; Crane v. Digert, 4 Wend. Rep. 675.] Taking into consideration the correspondence between the declaration and proof, as to the date of the attachment, the parties, and the amount of the judgment thereupon, when rendered, &c., we are constrained to regard the discrepancy, as to the amount of the attachment, wholly immaterial. If the amount of the attachment had been omitted entirely, the declaration would have been sufficient, [Jameson v. Ostrander, 1 Cow. Rep. 670]; but whether, being stated as descriptive of the process, if the variance was material it might be disregarded, it is not necessary to consider. [3 Starkie's Ev. 1542; 1 Saund. on Plead. and Ev. 340, *et post;* 2 Phil. Ev. C. & H.'s notes, 520—7.]

3. The cause of action, for which a recovery is sought, is, the neglect of the defendant, as sheriff, to levy an attachment, that was placed in his hands, at the suit of the plaintiff, on a sufficincy of property to pay the debt. Would the entry read from the trial docket, even if not erased, or in any manner obliterated, tend to sustain the allegation? We think not. The reasonable inference from it is, that the defendant in the attachment had "settled" with the plaintiff, or some one else, the demand in suit. Perhaps, it may be intended that, as the entry was made by the sheriff, the money was paid to him, although it does not appear that an execution was placed in his hands, until more than one month thereafter. If the money was received by the defendant, under the authority of process in his hands, it might be recovered upon notice and motion, under the statute; or, if collected without such authority, he would be liable to an action for money had and received. But in neither case would the receipt of the money show neglect in levying the attachment. This view is taken upon the hypothesis, that the obliteration of the entry has no influence on its admissibility as evidence. The charge to the jury upon this point, does not relieve the case from the error in the admission of the evidence. They are informed, if not expressly, at least by necessary implication, that it should be considered by them in determining whether the defendant had not been guilty of neglect, or of the want of due diligence, which is the same thing.

We have seen the evidence did not lead to such a conclusion. For the error, then, in its admission, as well as for the charge thereupon, the judgment of the county court is reversed, and the cause remandad.

CRAWFORD v. CAMFIELD.

1. In an action by the indorsee against the indorser of a promissory note, payable in bank, on the 1st November, 1839, the declaration alleges "that afterwards when the said note was due and payable, according to its tenor and effect, to-wit, on the 3d of August, 1839, it was presented, &c.," and continues the mistake of the time of payment, in the averment of protest and notice, but always under a *scilicit*, the mistake cannot be reached by demurrer, nor as a variance; consequently it is not available on error after judgment by default.

WRIT of Error to the Circuit Court of Washington county.

Assumpsit by Camfield against Crawford, as the maker of two promissory notes, and as the endorser of a third. The declaration contains counts on each of the notes, and also a general money count.

The count on the indorsement, describes a note made by one Gascoigne, dated 1st November, 1838, payable to Crawford, twelve months after date, for 250 dollars, negotiable and payable at the Branch of the Bank of the State of Alabama at Mobile; after stating the endorsement by the defendant, the count proceeds to aver, "that afterwards, when the said note became due and payable according to the tenor and effect thereof, *to wit, on the 3d day of August*, 1839, the same was presented and shewn for payment at the said bank," and payment being refused, it "was then and there, *to wit, on the 3d day of August*, 1839, duly protested for non-payment, of all which, the said defendant afterwards, to wit, on the day and year last aforesaid, had notice."

The defendant suffered judgment to go against him by default, and damages were assessed on all the counts.

He now prosecutes his writ of error, and assigns that no cause of action is shown in the count on the indorsement, and therefore, the judgment being for damages assessed on all the counts, is erroneous.

CRAWFORD, *prose*, submitted the case on written argument.
LESESNE, *contra.*

GOLDTHWAITE, J.—If a demurrer had been interposed in the court below, to the couut complained of as showing no cause of action, it would have availed nothing, as the material averment is, that the note was presented at the time when it was due and payable according to its tenor and effect. It was, according to its effect, payable on the 4th day of November, and therefore, the averment, under a *scilicit*, that it was presented on the 3d of August, is repugnant and cannot vitiate. This was the precise point decided in Bynner v. Russel, [1 Bing. 23,] and to the same effect is Jackson, adm'r v. Henderson, [3 Leigh, 196.] This disposes of the entire question; for if the defendant could have no advantage of the mistake on demurrer, and could not prevent the note, properly protested, from going to the jury, under this averment, he certainly cannot now be heard.

Let the judgment be affirmed.

JONES v. POPE—WAFER v. POPE,

1. The want of a bond and affidavit, in a suit commenced by attachment, must be taken advantage of by plea in abatement, and it does not vary the case that the attachment is sued out against a non-resident.
2. On the trial of an issue between the garnishee and plaintiff in attachment, the fact of the indebtedness of the defendant to the plaintiff, is not involved.

ERROR to the Circuit Court of Macon.

Attachment by the defendant in error against Jones; Wafer being summoned as garnishee. The defendant in attachment failing to appear, a judgment by default was rendered against him. The garnishee appeared and answered, denying being indebted to the defendant in attachment. An issue was made up under the statute, and the jury found that he was indebted to the defendant in attachment.

Upon the trial of the issue, the plaintiff, among other testimony, produced and read to the jury, the writ, declaration and other papers in the attachment cause, but produced no judgment against Jones, the defendant in attachment, for any certain amount. The garnishee then moved the court to charge the jury, that unless the plaintiff produced a judgment in the attachment suit against Jones, defendant in attachment, they should find the issue for him; which charge the court refused, and he excepted.

A writ of inquiry being awarded, to ascertain the damages of the plaintiff in attachment, the defendant, Jones, was permitted to appear by attorney, and a jury being impanneled, returned a verdict in his favor for seven hundred dollars, for which judgment was rendered—and thereupon the court rendered a judgment against the garnishee for $684 76, the amount found by the jury against him on the issue, besides costs.

The assignment of error by Jones is, that the attachment was issued without any affidavit being made, or bond given.

And by the garnishee, that it was not shown on the trial of the issue, that judgment had been rendered for any particular sum.

Harris, for plaintiff in error.
Peck, *contra.*

ORMOND, J.—It is objected, that the attachment in this case was sued out without an affidavit or bond, as required by the statute, but we think this objection cannot be taken on error. The statute declares, "that every attachment issued without bond and affidavit, taken and returned as aforesaid, shall be abated on the plea of the defendant." [Clay's Dig. 55, § 3.] The design of the statute is clear. The attachment is merely process levied on the defendant's goods, instead of personal service. It is the substitute for the *capias ad respondendum*, and like that, if issued improperly, must be abated by plea.

It is not a valid argument, that the defendant may not have notice, and therefore, may not be able to plead in abatement. This must have been foreseen, as a probable consequence, when the attachment law was passed, as the non-residence of the defendant is one of the causes for which an attachment may issue. The bond which the plaintiff was required to give, was considered a sufficient indemnity, and in a proper case, where no notice, in fact, had been received of the pendency of the attachment, a court of chancery would interpose and prevent injustice from being done.

The indebtedness of the defendant in atachment, to the plaintiff, was, it is true, an indispensable pre-requisite to the rendition of judgment against the garnishee, but it was not a matter involved in the issue tried between the garnishee and the plaintiff in attachment, the whole object of which was, to ascertain whether the garnishee was, or not, indebted to the defendant in attachment. The issue being found for the plaintiff, ascertained the existence of the debt due by the garnishee to the defendant, and supported the levy of the attachment, and as the plaintiff subsequently recovered a judgment against the defendant, he was entitled to a condemnation of the debt ascertained to be due from the garnishee.

The result of this examination is, that there is no error in the judgment of the court below, and it is therefore affirmed.

BEAL & BENNETT v. WAINWRIGHT, SHIELDS & COMPANY.

1. Where a promissory note, payable either in a bank of this or some other State, is indorsed before maturity, under the act of 1828, a set-off is not admissible to an action brought thereon by a *bona fide* indorsee

WRIT of Error to the Circuit Court of Tuskaloosa.

This was an action of assumpsit, at the suit of the defendants

in error against the plaintiffs, on a pomissory note, of the following tenor.

"$1,824 37. New-York, August 25, 1836.

Twelve months after date, we, the subscribers, of Erie, State of Ala., promise to pay to the order of Granger, Birch, & Co., eighteen hundred and twenty-four dollars and thirty-seven cents, at the Merchants' Bank, New-York, for value received.

BEAL & BENNETT."

On which note, are the following indorsements, viz. "New-York, February 24, 1837, Granger, Birch & Co." New-York, February 24, 1837. B. F. Lee, & Co. The cause was tried on the pleas of *non assumpsit*, payment and set-off. On the trial the defendants excepted to the ruling of the court. From the bill of exceptions it appears, that after the plaintiffs introduced the note declared on, with the indorsements set out above, the defendants gave in evidence two promissory notes made by Granger, Birch & Co. for $1,762 63, each, dated New-York, 25th July, 1836, payable at nine months after date, to the order of McNulty & Chapman, and by them indorsed to the defendants; and further proved, that these notes were transferred to the defendants before the maturity of the note sued on, and before they had notice of the assignment thereof. It was further shown by the defendants, that the signatures and indorsements of the notes which they offered as sets-off, were genuine, and the notes transferred to them unconditionally. This was all the evidence adduced; thereupon, the defendants moved the court to charge the jury, that the plaintiffs could not recover without proof, that notice of the transfer of the note sued on, had been given before they became proprietors of the notes offered as sets-off. This charge was refused, but the court charged the jury, that the note sued on being payable at a bank, was a commercial paper; subject to the law merchant, and if transferred before maturity, was not subject to set-off. A verdict was returned for the plaintiffs, and thereupon, judgment was rendered.

WM. COCHRAN, for the plaintiffs in error, insisted, 1. That the written date to the indorsements, was no evidence that they were made on that day. 2. The note sued on, is not of that class, which by the laws of this State, are made subject to the law merchant. 3. The law of set-off, is the law of the forum, and al-

though in New-York, the note may be governed by the principles of mercantile law, yet being sued here, any defence peculiar to the forum, must be governed by our laws. [Story's Conf. of Laws, 481; 2 N. Hamp. Rep. 296, Gibbs v. Howard; 3 Johns. Rep. 263, Ruggles v. Keeler; 1 Poth. on Ob. 641–2; 2 Id. 101, N. 12.]

J. J. Porter, for the defendant.—The reason given by the circuit Judge, viz: that the note being payable at a bank, was not subject to a set-off, may be incorrect, but a judgment will not be reversed for an erroneous reason, where the conclusion was correct. [2 S. & P. Rep. 428; 5 id. 195; 7 Porter's Rep. 40; 9 id. 403; 1 Ala. Rep. N. S. 423.] The note was payable in New-York, and as we cannot judicially know what the laws of that State are, we must suppose that the English common law prevails there; according to which, the note is clearly negotiable.—[Minor's Rep. 387; 1 Porter's Rep. 388; 1 Ala. Rep. 80; 2 id. 392; Gray v. White, June Term. 1843; Dunn v. Adams, Parmeter & Co. 1 Ala. Rep. 527; 3 Kent's Com. 72, and note *a* 77; Chitty on Bills, 218, 583.] A negotiable note, transferred before maturity, to an innocent holder, is not subject to sets-off, existing between the original parties. [Chitty on Bills, 6; 4 Dal. Rep. 307; 16 Wend. Rep. 659.] The *lex loci contractus*, must determine the character of the security—what rights it confers, and obligations imposes. [Story on Bills, § 129, 139, 161; Story's Conf. of Laws, § 263, 556. 353 *a* 565, 566; Story on Bills, § 158, 173; 1 Bing. New Cases, 151, 159 to 161; Story's Conf. of L. § 317, 332, 343, 344; 16 Martin's Rep. 277.] The case cited by the plaintiff in error from 2 New-Hamp. Rep. does not lay down the law correctly. [Story's Conf. of L. 481.[

Where a bill or note, is indorsed in blank, it is a legal presumption, that the transfer was made before its maturity. [3 Day's Rep. 311; 5 Mass. Rep. 335; 8 Wend Rep. 600.]

COLLIER, C. J.—If the note declared on be negotiable, according to the laws of the State in which it was made, even conceding as argued for the plaintiffs in error, that the *lex fori* must determine whether a set-off is admissible against an indorsee, does it follow that the set-off was improperly rejected by the circuit court? The negotiability of the note in New-York, has not been questioned, but seems to have been conceded at the argu-

ment upon the principles of commercial law, which, in the absence of opposing legislation, must prevail there. Our statute of 1828, enacts, that the remedy on promissory notes, payable in bank, shall be governed by the rules of the law merchant, &c.—[Clay's Dig. 383, § 11.] This being the case, would not both the *lex loci contractus*, and the *lex fori*, concur in the rejection of a set-off against the note in question, in the hands of a *bona fide* indorsee, who became such previous to its maturity? The instruction which the defendants prayed the court to give the jury, was, not as to the time when the note was transferred, but it assumed, that it was subject to the general law of set-off, and to defeat the defence, it was necessary for the plaintiff to have informed the defendants, that they had became the indorsees of their paper; and this, before the defendants acquired the notes which they adduced. The court instructed the jury, that the note declared on, was subject to the law merchant, and if transferred before its maturity, the defendants could not avail themselves of their sets-off.

We need not inquire, whether the law of set-off, pertains to the remedy, and is to be administered according to the regulations existing upon the subject in the country where the suit is brought, or whether the act of 1828, applies only to notes payable in our own banks. Upon the assumption, that our law is to regulate the right of set-off, that statute, as it is the only one applicable, must determine the negotiable character of the note; and then commercial law declares, that in such case, there can be no set-off, unless the paper was indorsed subsequent to its maturity. In the refusal to charge, a different principle is not recognized, while in the instruction given, the law is laid down as we have stated it.

This view is decisive of the case, whether it be considered with reference to the laws of New-York, or of this State, and shows, that according to either, the bill of exceptions does not discover an available error. We are, therefore, relieved from a more particular examination of the points made by the arguments of counsel, and have only to add, that the judgment of the circuit court is affirmed.

KING v. MOORE.

1. A sum of money produced by the sale of the effects of a defendant in execution, remaining in the hands of a constable, after satisfying executions against the defendant, is subject to be attached; and it is no defence to the garnishee process that the defendant in execution has commenced proceedings against the constable for the recovery of the surplus so remaining with him.

WRIT of error to the Circuit Court of Russell county.

King, the present plaintiff in error, was summoned as a garnishee, at the suit of Moore against Lewis, and answered, that he had in his hands 113 dollars belonging to the defendant, the remainder of the proceeds of a sale made by him as constable, after satisfying the *fi. fas.* directed to him. In a supplemental answer, he asserts the money had been demanded from him by the defendant in execution, and that he had received notice of a rule against him to pay over the money.

The court rendered judgment against him for the amount of the judgment previously rendered against the defendant in attachment, which was less than the sum in his hands. He now assigns the judgment as error.

HEYDENFELDT, for the plaintiff in error, relied on the case of Zurcher v. Magee, [2 Ala. Rep. N. S. 253.]

No counsel appeared for the defendant in error.

GOLDTHWAITE, J.—In Zurcher v. Magee, [2 Ala. Rep. 253,] we held, that money collected by a sheriff was not subject to an attachment against the plaintiff in the execution; but the principle of that case is supposed not to govern this. One reason why money, in this condition, cannot be reached, is, that it is in the custody of the law; and it would be greatly inconvenient to allow the final process of courts to be affected by other proceedings not under control of the parties to the execution. This reason does not apply to the excess which oftentimes must, necessarily, remain with the executive officer, after satisfying the

plaintiff's demands. The officer is the agent appointed by the law, to sell the property of the defendant; and if, in the dischage of this duty, a sum of money remains with him, it is the money of the defendant, in no way distinguishable from any other case of agency. Nor does the circumstance, that a statute authorizes the defendant, when his money is improperly detained from him, to proceed summarily against the officer, bring the case within the principle which exempts money, *in custodia legis*, from attachment, because no process is meddled with; nor can any injurious consequences flow from considering it in the same view as any other money in the hands of an agent.

Let the judgment be affirmed.

GARY, ET AL., v. HATHAWAY.

1. Where there are several plaintiffs, whose judgments are of the same date, and whose executions came to the sheriff's hands at the same time, the right to suggest to the court that the sheriff could have made the money by due diligence, [Aik. Dig. 175, § 78,] is given to each, and neither can be affected in his right to recover of the sheriff, by the action of any other, or by his failure to act. Therefore, when several plaintiffs, having judgments and executions of equal dignity, severally suggested at the same term of the court, that the sheriff could have made the money on the execution, by due diligence, the sheriff cannot reduce the amount of the recovery, in either of the cases, by proving that judgments had been rendered against him on the other suggestions, sufficient to absorb the value of all the defendant's property subject to sale by execution.
2. Upon a suggestion against the sheriff, under the statute, a plaintiff in execution cannot recover more than the value of the effects of the defendant liable to execution.
3. Whether a court of chancery could afford relief, and apportion the fund, when several plaintiffs have, by their several judgment, recovered of the sheriff a sum beyond the value of the property of the defendant subject to sale by execution---*Quere*.

ERROR to the County Court of Sumter.

This was a suggestion, under the statute, by the defendant in error, against the sheriff of Sumter, alleging that, by due diligence, he could have made the money on an execution of the defendant in error.

The sheriff appeared, and an issue was made up upon the suggestion, and the jury found, that the sheriff could have made the money on the plaintiff's execution, by due diligence. The record recites, that it was made to appear to the satisfaction of the court, that certain persons (naming them) were the sureties of the sheriff, against whom, with the sheriff, judgment was entered for the amount of the plaintiffs' execution.

Pending the trial, as appears from a bill of exceptions, the sheriff offered to introduce in evidence certain judgments, which had been rendered against him, on suggestion previously, at the same term, in favor of other plaintiffs in execution, whose executions were of the same grade with that of the defendant in error, and came to the sheriff's hands at the same time; and offered to prove that these judgments would consume all the property of the defendant in execution; which evidence, on motion of the defendant in error, the court excluded, and to which the plaintiff in error excepted.

The assignments of error are—

1. That the judgment is rendered on a suggestion different from that filed, and to which they pleaded, and went to trial.

2. Because the sureties were not named in the suggestion as parties to the suit.

3. Because it does not appear that the execution was ever in the hands of the sheriff.

4. Because it does not appear to have been shown that Gary was sheriff of Sumter county during the life of the execution, or who were his sureties.

5. Because the judgment is rendered on the finding of a single fact by the jury, that the money could have been made by diligence, without the other facts being passed on by them.

6. Because the court decided matters of fact.

7. The matter of the bill of exceptions.

8. The judgment is for too much.

9. Because the judgment is not authorized by the facts found or appearing in the record.

The cause was argued at the January Term, 1843, by BLISS, for plaintiff's in error, and SMITH for defendant in error.

A re-argument being ordered, it was again argued at the June Term, 1843.

BALDWIN, for plaintiff in error.

SMITH, *contra.*

ORMOND, J.—In the case of Smith v. The Branch Bank at Mobile, at the last term, we held, as the result of all the cases on summary judgments, that when the defendant appeared and pleaded, the proceeding was like any other cause commenced in the ordinary mode, and be governed by the same rules, except that it must appear on the record that the court had jurisdiction. In this case, the sheriff appeared, and an issue was made up upon the suggestion, and the jury found, that by due diligence, the money could have been made. This disposes of the first, third and fourth assignments of error, as they are all concluded by the finding of the jury.

It was not necessary that the plaintiff should make the sureties parties to the motion; but it was sufficient to authorize a judgment against them, that the sheriff was a party; and that it was shown to the court that they were his sureties, [McRae v. Colclough, 2 Ala. 74.] which, it appears from the record, was done in this case. If the sureties desired to contest the fact of suretyship, they could have done so, and, on the plea of *non est factum*, have submitted that question to a jury. If they omit to do so, the court has power to determine the fact. [See the case last cited, to which many might be added.]

The fact that the money could have been made by due diligence, is required by the statute to be found by the jury. Upon a general traverse of the suggestion by the sheriff, a general finding by the jury of the issue for the plaintiff, would, doubtless, include this, and satisfy the statute. What the precise issue was, we are not informed; but it must have been, either a general denial, by the sheriff, of all the facts of the suggestion, or a denial of the particular fact of want of diligence; and, in either case, the finding was sufficient to authorize a judgment. The finding, in this case, was in the precise terms of the statute, and necessarily includes other facts—as that the defendant was sheriff, and that

the execution was in his hands. [See Adams v. White, 2 Ala. Rep. 37.] As, therefore, the finding of the jury ascertained the existence of those facts on which the liability of the sheriff depended, it only remains to consider the question of law presented on the bill of exceptions.

It appears that the sheriff offered to introduce in evidence several judgments, which had been previously, but at the same term of the court, rendered for failing to make money on executions, which came to his hands at the same time with that of the plaintiff's; and, also, offered to prove that all the property of the defendant in execution was not sufficient to satisfy all the executions. The object of this evidence appears to have been to scale the recovery of the plaintiff to a *pro rata* compensation, and to place him on the same footing as if the sheriff had levied on, and sold all the property of the defendant in execution.

This is a question which has not been before presented, and is not free from difficulty. Our first impressions were, that the evidence was admissible; but, upon a re-argument, and having given the question mature deliberation, we are satisfied our first impressions were erroneous.

The statute, under which this proceeding was had, permits the plaintiff in execution, where the sheriff has failed to make the money, to suggest to the court, that it could have been done by due diligence; and if, upon an issue made up under the direction of the court, the jury find such to be the fact, judgment is entered for the plaintiff for the amount of the execution. [Aik. Dig. 175.]

We think it very clear, that where a plaintiff in execution moves against the sheriff, under this statute, he cannot recover beyond the amount which the sheriff, by diligence, could have made of the property of the defendant in execution; because, that is the extent of the injury he has sustained by the default of the sheriff, if he proves the allegations of his suggestion. Our first impressions were, that the rule would be the same where there were more plaintiffs than one, whose executions were all precisely on the same footing, and the property of the defendant in execution was not sufficient to satisfy all; but on a little reflection, it is obvious that the statute gives the right to any plaintiff in execution, who is thus injured by the default of the sheriff; and if he acts, his actions are necessarily unconnected with any other judgment ceditor, who may have the same rights with himself.

It is very clear, that several plaintiffs in execution, having each the same right to proceed under the statute, could not unite in one motion against the sheriff; nor could one make the motion on behalf of the others, as well as himself, not only because there is no community of interest, but, also, because this is a right conferred by statute, and must be exercised in the mode there pointed out. It is not a vested right to recover a sum of money of the sheriff, but is rather a right to recover a penalty of the sheriff for his neglect of duty, which is not vested until judgment is obtained. In this proceeding, therefore, each plaintiff in execution exercises a right conferred on him by the statute; and as it is very clear that one of the several plaintiffs in execution could recover of the sheriff, though all the rest should decline to avail themselves of the privilege conferred by the statute, so it is equally certain that he cannot be affected by their action.

That this is the correct view, will be seen by looking at the consequences which would flow from a contrary doctrine. Let us suppose, as in this case, that several plaintiffs, having an equal right to proceed against the sheriff for a neglect of duty, make their suggestions at the same term of the court. The first, in point of time, must get his judgment, if the defendant had property sufficient, as the sheriff could not show that other motions were pending against him, as it could not be known that they would ever be made, or, if made, that they would be successful. When the second is called, if the sheriff is permitted to show that the judgment just rendered will absorb all the property of the defendant in execution, the recovery of the plaintiff will be scaled to a *pro rata* division. By the same process, when the third is called, the recovery will be still further reduced; and, in the same manner, to the last, when, for the first time, will it be ascertained what the aliquot or just distributive share of each execution creditor is.

It is impossible to suppose that the Legislature contemplated such a result as this—that with rights precisely the same, the amount recovered should be different in each case, and depend upon the accident or caprice of the clerk in placing the motions on the docket. It is probable that the consequences of such a state of things as is exhibited in this record, were not foreseen by the Legislature, but which result necessarily from the separate action of each plaintiff in execution. Such a thing as compelling

contribution from, or making distribution of a fund among several persons, cannot be conceived without the concomitant power of bringing all the parties before the court interested in the matter. This a court of law cannot do; and, therefore, it appertains to the equitable power of a court of chancery. Whether that court would not, in a proper case, call all the parties before it, and apportion rateably among them, the fund which would have been produced by a sale of the property of the defendant in execution, it is not necessary now to determine. In a court of law, proceeding under this statute, we entertain no doubt that each plaintiff in execution may exercise the right conferred on him by the statute, and that he cannot be impeded or controlled in this right by the action, or by the failure to act, of any other having no greater rights than himself.

Let the judgment be affirmed.

The heirs and distrirutees of HILL v. HILL'S ex'rs.

1. A writ of error can be prosecuted by him only, who is a party or privy to the record, or injured by the judgment; and who will consequently derive advantage from its reversal.
2. Where certain persons describing themselves as sisters and brothers of the deceased, bring error to reverse an *ex parte* order, admitting the supposed will of the decedent, to probate, it cannot be intended (in the absence of any affirmation in the record,) that they are the nearest of kin in interest, and the writ of error will be dismissed.
3. *Semble:* It is competent for the judge of the county court to set aside the probate of a will, which he had previously allowed without proof, or upon insufficient proof, and without notice to the widow and next of kin, as directed by statute.

Writ of Error to the Orphans' Court of Butler.

From the record it appears, that the defendant in error, on the 21st September, 1840, propounded for probate, a testamentary

paper, and made an affidavit, that the same was the last will and testament of Josiah Hill, dec'd, &c. This paper is attested by five names as subscribing witnesses, but was admitted to probate upon the affidavit of two of them, deposed to in open court, declaring ,that they were personally present, and saw Josiah Hill sign, seal, deliver, and heard him acknowledge and publish the within to be his last will and testament, and that they subscribed themselves as subscribing witnesses to the same, and that he was, as they believe, in his proper mind, and well aware of what he was doing;" thereupon, letters testamentary, were issued to the defendant—he being one of the executors designated by the testator for the execution of his will. The paper is dated the twenty sixth day of August next preceding its probate, and undertakes to dispose of both real and personal estate. These are all the facts shewn by the transcript.

Elmore and N. Harris, for the plaintiffs in error, made the following points: 1. There was no citation issued to the widow, or next of kin of the deceased, to show cause against the application for the probate of his supposed will; nor was there any proof that the testator had no widow or kindred resident in the State. 2. It does not appear that the widow, or next of kindred, had notice of the application for probate, in any manner. 3. The affidavit of the witnesses, who appeared in court to prove the will, is insufficient for the purpose, because it is not shown that the others, whose names appear as witnesses, attested the same, either separately or in the presence of each other. They cited Clay's Dig. 303, § 34; id. 596, § 1; Shields, et al. v. Alston, 4 Ala. Reports, 248.

Boling and Judge, for the defendant.

COLLIER, C. J.—The writ of error in this case, is sued out by two of the legatees named in the testator's will, of whom there are four in all, two designated as his sisters, one as brother, and a fourth as his brother-in-law. It is not shewn by the record, that there was any contestation in the orphans' court, upon the will being offered for probate, that a citation issued to the widow or next of kin, or that there was proof that the testator had no widow or kindred resident in this State. In this posture of the case, it

is difficult to conceive how it can be here entertained. It is said in the elementary books, and reiterated by the adjudged cases, that a writ of error can be brought by him only, who is a party or privy to the record, or injured by the judgment, and who will, consequently, derive advantage from its reversal. It may, therefore, be brought by an executor or administrator, or the heir, reversioner or remainderman, according to the nature of the proceeding sought to be revised. [1 Arch. Prac. 231; 9 Viner's Ab. 493, et post; 2 Dunlap's Prac. 1120–1; Dale ex dem. v. Roosvelt, 8 Cow. Rep. 333; Vanhorn v. Frick, 3 Serg't & R. Rep. 278; Fotteral v. Floyd, 6 id. 315. See also, Roberts v. Taylor, et al. 4 Porter's Rep. 421; Headon v. Turner, adm'r at this term.]

The proceedings in the county court were entirely *ex parte*, and although the interests of the plaintiffs in error may be affected by them, yet it cannot be assumed that they were prejudiced by the probate of the will and the grant of letters testamentary, or that they will be benefitted by a reversal of the order by which this result was consummated. As the record does not show that the testator has not other kindred more nearly related to him than the plaintiffs, we cannot assume as a conclusion of law, that if the will is set aside, they will come in for shares of his estate, as heirs and distributees. Unless such is the legal inference, they cannot be recognized as privies, who will derive advantage from a favorable judgment of this court.

As to the steps necessary to be pursued by the orphans' court when a will is propounded for probate, or to coerce its production in order to inquire into its validity, the law is explicitly stated in the case of Shields, et al. v. Alston, [4 Ala. Rep. 248.] But to prevent injurious consequences from the irregular action of the orphans' court, it may be very well to point out what the record indicates would be the appropriate remedy in the present case. By the fifth section of the act of 1821, it is enacted that "the judge of each orphans' court, shall have power within the county, to take the probate of wills, grant and repeal letters testamentary, and letters of administration, &c." [Clay's Dig. 303 § 31.] Here is an authority to annul letters testamentary, which may have issued unadvisedly, or which subsequent occurrences make it proper should be recalled. The statute does not expressly authorise the orphans' court to set aside the probate of a will

which it has allowed, yet we apprehend that it is entirely competent, in the absence of legislation to the contrary, for that court to set aside the probate of a will which it has allowed without proof, or upon insufficient proof, and without notice to the widow and next of kin, as directed by the eighth section of the act of 1821. [Clay's Dig. 303, § 34. See also, Shields, et al. *ut supra.*] This being the case, the plaintiffs in error should apply to the Judge of the orphans court for a citation to the executor and other parties in interest, to show cause why the probate of the will should not be vacated, and the letters testamentary, repealed. Upon such a proceeding, the redress sought can be obtained.

The plaintiffs not being shown by the record to be in a situation to prosecute a writ of error, the same is therefore dismissed.

FRAZIER, USE, &c. v. THOMAS.

1. The act of 1821, [Clay's Dig. 506, § 3,] does not give the landlord a lien on the crop raised on the rented land; it merely declares that, as between the landlord and an execution creditor, the former shall be entitled to preference, to the extent of one year's unpaid rent.
2. A count, of a declaration asserting that a landlord had a lien upon certain chattels, which has been destroyed by the act of the defendant, is bad, without showing how the lien was created: the existence of a lien is the conclusion of the law upon certain facts, and they should be stated, in order that a judgment may be formed of the existence of the lien.

WRIT of Error to the County Court of Sumter county.

The declaration has three counts; the first is trover for 50 bags of cotton; and the other two are in case for removing a quantity of cotton grown upon land leased by the plaintiff to one Barron, without paying or tendering the plaintiff, the amount due for the rent. The last count set out the use and occupation of the premises by Barron, the growing of the cotton upon the land,

its liability to pay the rent and its removal by the defendant, whereby the rent was lost. It also avers that the cotton was subject to a lien of the plaintiff, and that by the removal, this lien was lost. The other count in case, is similar to this, but there is no specific allegation of a lien. Both were demurred to, and overruled as insufficient.

The defendant had a verdict on an issue to the count in trover, and the plaintiff prosecutes this writ of error, and here assigns the judgment sustaining the demurrer as cause for reversal.

Bliss, for the plaintiff in error.
Boyd, *contra*,

GOLDTHWAITE, J.—1. The common law remedy of distress was abolished by the act of 1812, [Clay's Digest, 506, § 2.] and therefore, if the landlord had any lien upon the goods of his tenant when this action accrued, it must have been under the act of 1821, which is in these terms: "The crop grown on any rented land in this State, shall not be liable to be taken by virtue of any execution, or removed off the premises of any such rented land, unless the party so taking the same shall, before the removal of the crop from the premises, pay or tender to the landlord or lessor thereof, or his agent, all money due for the rent of the said premises, at the time of taking such crop in execution; *Provided, nevertheless*, that such rent or arrears, do not amount to more than one year's rent, and if more be due, then the party suing out such execution, paying or tendering to such landlord or his agent, one year's rent, may proceed to execute his judgment, and the sheriff or officer levying the same, is hereby empowered and required to levy and pay to the plaintiff, as well the money so paid for the rent, as the execution money." [Clay's Digest, 506, § 3.]

It is perfectly clear, this only gives a lien to the landlord on the crop, as against an execution creditor of the tenant: between these, the statute gives a preference to the landlord, but the lien is not created in any instance.

2. It is supposed, however, that the demurrer ought not to have been sustained, because the count contains an express averment, that the plaintiff had a lien on the cotton carried away by the defendant, and as this fact is admitted by the demurrer, the

taking must be considered as wrongful. This view is not admissible, because the existence of a lien, is a conclusion of the law from certain facts, and these are necessary to be stated, in order that a judgment may be formed with respect to the existence of the lien, If the precedent matter should be rejected, the count could not be sustained on the assertion, that the plaintiff had a lien upon the cotton. Whether we consider the assertion, that there was a lien as predicated on the facts stated, or as standing alone, the count is alike defective.

Judgment affirmed.

CHILTON & BOWDON v. HARBIN.

1. When judgment is rendered for the defendant, on a demurrer to a plea in abatement, it is error if the court refuse to permit the plaintiff to take issue on the facts of the plea.

ERROR to the Circuit Court of Talladega.

The defendant pleaded in abatement of the action, that he was not sued in the county of his residence. The plea was sworn to before a justice of the peace. To the affidavit was appended a certificate of the county clerk, certifying the official character of the justice, with the county seal attached. To this plea, the plaintiff demurred, and the court overruled the demurrer. Thereupon, the plaintiff moved the court for leave to take issue on the plea, which the court refused, and rendered judgment for the defendant. This is now assigned for error.

BOWDON, for plaintiff in error.
PRYOR, *contra*.

ORMOND, J.—The plea setting forth the freehold and residence of the defendant in another county, was sufficient, and the de-

murrer to it was correctly overruled. The affidavit of its truth, made before a justice of the peace, was not objectionable, as the statute only requires that the plea should be accompanied by an affidavit of its truth, when the fact does not otherwise appear.

But in refusing permission to the plaintiff to take issue on the facts of the plea, the court erred. It is certainly the rule of the common law, that the judgment for the defendant on a plea in abatement, whether it be an issue in fact or in law, is, that the writ be quashed. This rule of the common law has been changed by our statute, which authorises the party after his demurrer is overruled, to take issue on the facts. The exercise of this right does not rest in the discretion of the court, and as it was demanded, it was error in the court to refuse it.

In the case of McCutchen v. McCutchen, 8 Porter, 151, it did not appear that the plaintiff desired to contest the facts alleged in the plea, and we therefore held that it was proper to render judgment final.

Let the judgment be reversed, and the cause remanded.

KEMP & BUCKEY v. PORTER.

1. A writ of error will not lie, from an order of court, permitting a sheriff to amend his return to a *fieri facias;* the party prejudiced by such order has a remedy by *mandamus*, to cause it to be vacated.

WRIT of Error to the Circuit Court of Autauga.

A *fieri facias* on the 30th April, 1842, was issued from the circuit court of Autauga, against the goods and chattels, lands and tenements of Messrs Hearndon & Kelly, requiring to be made the sum of twenty-two hundred and fifty dollars and forty-eight cents, besides costs, which had then lately been adjudged to the plaintiffs. This execution was placed in the hands of the defendant, the sheriff of Benton, who indorsed thereon, that he had levied the same on real and personal estate, particularly designated.

The levy is dated the 9th of May, 1842, but does not state whether any disposition was made, or proposed to be made, of the property. At the October term of the circuit court of Autauga, holden in 1843, the defendant moved for leave to amend his return according to the facts, so as to show the condition of the property at the time of the levy, and what disposition had been made of it. The motion was opposed by the plaintiffs. 1. Because no foundation was laid by affidavits to authorise the amendment. 2. Because the plaintiffs had commenced and were prosecuting proceedings against the sheriff for not making the money, upon the suggestion, that by due diligence he could have made it on the execution. It was admitted that the causes for which the motion was opposed, were true in point of fact; but the motion was allowed, and the amendment made; thereupon, the plaintiff excepted, and his bill of exceptions was signed and sealed by the presiding Judge.

Pryor, for the plaintiffs in error, cited Goodwin v. Smith, 4 N. Hamp. Rep. 29, 35; Holderman v. Brassfield, Lit. Sel. Cases, 271.

Wm. B, Martin and Morris, for the defendant.

COLLIER, C. J.—It is objected by the defendant, that the permission of the circuit court to amend his return, is not a final judgment or decree, which can be reviewed on error. The amendment certainly settles no question definitive of the rights of either party. It will not bar the proceeding which the plaintiffs have instituted for the failure of the sheriff to make the money on their execution. The return of a sheriff in such case, is never regarded as conclusive evidence in his favor, but may be falsified by proof. True, in the present case, the indorsement of a levy on the execution, without showing how the property had been disposed of, would subject the sheriff to liability, and the perfection of the return cannot so operate as to discharge him. The only effect will be to require the plaintiffs, instead of showing that the defendant in execution had property from which it could have been satisfied, by the mere production of the sheriff's indorsement, to adduce extrinsic evidence to contradict and disprove its truth. In this view, the amendment by leave of the court, is certainly not an order which determines finally whether the plain-

tiffs are entitled to recover, or the sheriff is absolved—the circuit court merely permitted that to be done, which it was informed could and should have been done previously. We need not consider whether its decision was correct or not, but we will remark, that our courts have always been very liberal in permitting sheriffs to amend their returns of process according to the truth of the case—that officer is regarded as pledged by his official oath, to the performance of his duties; and hence no additional oath is required to satisfy the court, that what he does officially, is correctly done.

If the amendment in the present case has been improperly permitted, and the plaintiffs are prejudiced, they have an adequate remedy by *mandamus;* but the writ of error cannot be entertained, and is consequently dismissed.

ALSTON v. GRAVES & HOGAN.

1. Under the act authorising discoveries in suits at law, it is no objection to the discovery sought, that it does not rest within the exclusive knowledge of the party required to answer; or that it is not shown that the matter cannot be proved by witnesses.
2. When a party fails or refuses to answer interrogatories propounded under this act, the court is not authorised to consider the interrogatories as confessed, or to submit an account, exhibited with them, to the jury, without further proof than arises from the judgment by default, entered under the statute.

WRIT of error to the County Court of Marengo county.

Assumpsit by Graves & Hogan against Alston for medicines and medical services. The defendant having failed to answer certain interrogatories propounded to him, under the statute, was defaulted, and the damages being uncertain, were assessed by a jury.

The caption to the interrogatories is in these words, after stating the title to the suit, &c.: "Whereas, Peter E. Graves and

William L. Hogan, plaintiffs, &c., desire a discovery from the said Alston in said case, to be used as evidence on the trial of the same, do herewith file written interrogatories to said Alston, and hereby call on him to answer the same in solemn form on oath or affirmation." The interrogatories require the defendant to state whether the plaintiffs did not practice as physicians in his family during the year 1841, at his instance and request, and perform all the services, as mentioned in an account exhibited, at the times therein mentioned; and if not, to state what parts were not performed. Also, to state where the said plaintiffs kept their office at the time of performing the services, and how far that place was distant from the place where the services were performed; and how far the plaintiffs had to travel to perform the same.

The affidavit, on which this call for discovery was made on the defendant, is by one of the plaintiffs, and is in these terms: "Personally appeared, &c., Peter E. Graves, one of the plaintiffs, &c., who, being duly sworn, saith on oath, that the answers to the foregoing interrogatories, will be material evidence in the case stated, on the trial of the same."

These interrogatories were filed at the term next preceding that when the trial was had, and an order obtained thereon to compel a discovery under the statute. At the trial term, the defendant demurred to the affidavit and interrogatories, on the ground, that the facts alleged were not such as would have entitled the plaintiffs to a discovery in chancery. This was overruled by the court, and judgment by default was rendered against the defendant, and an inquiry of damages executed forthwith. On this inquiry of damages, the plaintiffs, having introduced a witness to prove the value of the services set forth in their account, closed their case. In the account exhibited with the interrogatories, there is no price affixed to services charged. The defendant then gave in evidence a copy of the account which had been furnished to him by the plaintiffs, wherein the amounts charged for the different services were different in several items, from the amounts charged for the same items in the account sued upon; and, thereupon, asked the court to charge the jury, that the judgment by default for failure to answer the plaintiffs' interrogatories, was not sufficient evidence that the services, as charged, had been rendered, but that the plaintiffs must prove their services by other evidence. This was refused; and the ju-

ry was instructed, that the failure to answer the interrogatories, and the judgment by default consequent thereon, was an admission on the part of the defendant, that the services were rendered as charged. The court further charged, that the copy of the account introduced by the defendant, was evidence, not only of the services rendered, and of the value thereof, but of such medicines and their value as were specifically charged. These several matters were excepted to by the defendant, and are here assigned as error.

MURPHY, for the plaintiff in error, relied on the case of Branch Bank at Montgomery v. Parker, [June Term, 1843,] to show that the affidavit is insufficient; and contended, also, that the plaintiff, notwithstanding the failure to answer, was bound to make out his case by proof

GOLDTHWAITE, J.—In the cases of Goodwin v. Wood, [January Term, 1843,] and Branch Bank at Montgomery v. Parker, [June Term, 1843,] we held that the proceedings under the act providing more effectually for discoveries in suits at common law,]Clay's Digest, 341, § 160,] was chiefly to be governed by the rules which obtain in courts of equity in relation to bills for discovery; and, in the former case, we considered interrogatories as in the nature of a *fishing bill*, when neither their subject matter, nor the affidavit of the party, showed the subject of inquiry to be within the knowledge of the person from whom an answer was required. In the present case, the interrogatories, when taken in connexion with the declaration, obviously create the impression that the entire subject matter of inquiry is within the knowledge of the party who is called on to answer them; but conceding this is sufficiently shown, the further question arises, whether the plaintiffs are entitled to a discovery in relation to matters of fact which are not alleged as difficult or incapable of proof by witnesses in the ordinary mode.

We are aware that it has been held in several cases, that if a bill seeks discovery in aid of the jurisdiction of a court of law, it ought to appear that such aid is required. If a court of law can compel the discovery, a court of equity will not interfere; and, it has been said, that when facts, which depend upon the testimony of witnesses, can be procured or proved at law, a court of equity

ought not to interfere to delay the cause. [Gelser v. Hoyt, 1 J. C. 547.] And bills for discovery and injunctions to stay proceedings at law, have been held defective when they did not aver that the defence could not be established at law without the aid of the discovery sought. [Legget v. Postly, 2 Paige 601; Seymour v. Seymour, 4 J. C. 411.]

However this may be with respect to bills for discovery and injunction to stay proceedings at law, until the discovery, it is certain that no such doctrine can be found in the elementary treatises, or in the English cases, when considering the right to a discovery in aid only of a suit or defence at law. Mitford lays down the rule in these words: The plaintiff may require this discovery, either because he cannot prove the facts, or in aid of proof to avoid expense. [Mitford on Plead. 207.] Lord Hardwick, in 1741, in Brownlow v. Gamal, [2 Atk. 240,] says, a plaintiff is entitled, not only to have discovery in matters which he cannot prove, but of such matters as may be of use and relief to him in recovering his title. Again, in 1751, in Lord Montague v. Dudman, [2 Vesey, 375,] he says, a bill of discovery lies here to aid the proceeding in some suit relating to a civil right in a court of common law. And, afterwards, [in Finch v. Finch, ib. 392,] he insists, that every plaintiff is entitled to have a discovery from defendants, on two heads: to enable him to have a decree, and to ascertain facts material to his case, either because he cannot prove, or in aid of proof; for a man may be entitled to an answer of what he can prove to avoid expense. Judge Story, in a note to his work on Equity Pleadings, after citing the New York cases, which seem to sustain a different course of practice, distinguishes them as being bills praying injunctions of the suits at law, as well as discovery; and admits the rule is otherwise when the bill is for discovery only in aid of a suit or defence at law. [Story's Equity Plead. 260, n. 1.]

We feel authorized, then, to come to the conclusion, that, under this statute, it is no objection to the discovery sought, that it is not shown that the knowledge of the facts rests solely with the party, and that it is immaterial that they can be proved by other witnesses. These considerations show that there is no substantial defect in the affidavit and interrogatories, and the court properly enough defaulted the defendant for his failure to answer the interrogatories.

2. With respect to the subsequent action of the court, in admitting the account to the jury without evidence, and the charge to the jury, we remark, that it is certainly erroneous. The act referred to does not, either directly or by implication, warrant the idea that the effect of a decree *pro confesso*, was intended to result from a refusal or neglect to answer within the time allowed by the statute. It provides very distinctly what shall be done, if there is a failure to answer, or if the answer is evasive. The court may attach the party, and compel him to answer in open court. It may continue the cause, and require more direct and explicit answers; or, if the defendant is the party who fails to answer, his pleas may be stricken out, and a judgment given against him as by default; and, if he is the plaintiff, may order his suit to be dismissed with costs. Beyond the action thus indicated, there is no authority to act; and, consequently, the court erred in charging the jury, that the account must be considered as established by the default and the refusal to answer.

Judgment reversed, and cause remanded.

WISWALL v. TICKNOR AND DAY.

1. T. executed a mortgage to D., on the 28th April, 1840, by which to secure the payment of certain debts, (the amount or description of which are not stated,) he conveyed real estate, slaves, house-hold furniture, and "a stock of groceries, chandlery, goods, wares and merchandize," reserving the right to "retain in his possession, and use the goods, wares, merchandize, &c. and to sell and dispose of the same" to satisfy the mortgage debt, and if the said debt was not paid on or before the 1st December, 1841, then the mortgagee was authorised to sell and dispose of the mortgaged property, giving thirty days notice, &c. T. retained the possession of the mortgaged property for more than a year after the 1st of December, 1841, sold in his own name, the stock of goods, and with the proceeds, frequently replaced it—sold the slaves, and some other personal property, and invested the proceeds in trade—paid the mortgagee from the sales of the store, more than ten thousand dollars, but without diminishing the mortgaged debt, it being re-invested in goods and merchandize: *Held*, 1. That it was a suspicious circumstance that no schedule or inventory of the property conveyed, or the debt to be secured, accompanied the deed, although this of itself would

not be evidence of fraud, it would, unless the omission was explained, add weight to any other objection that might exist to the deed. 2. That the retention of possession, by the mortgagor, after the law day had passed, was a badge of fraud. 3. That this inference of fraud, from the possession, so far from being repelled, was confirmed by the facts admitted; that the mortgagee permitted the mortgagor to retain and use the property as his own, by selling it in his own name, and by re-investing the proceeds in other articles of merchandize, to be again sold, and the proceeds again re-invested—that whatever might have been the intention of the parties, these acts were, in law, evidence that the deed was made with the intention to delay, hinder, and defraud creditors, and therefore, as against them, void.

2. Whether a mortgage of articles of merchandize, which the mortgagor has the right to *use*, sell and dispose of, for the purpose of paying the mortgage debt, is not fraudulent *per se*—*Quere*.

APPEAL from the Chancery Court at Mobile.

The bill was filed by the plaintiff in error, and charges, that he obtained a judgment against Ticknor in the circuit court of Mobile, for $2,233 17, that execution has issued thereon, and been returned, no property found. That Ticknor, about the 28th April, 1840, for the purpose of defrauding his creditors, executed to one Day, a conveyance or deed, of all his property, real and personal, a dwelling house, with his furniture, plate, and a storehouse and stock of groceries, carriage and horses, slaves, and interest in a steam-boat. That Ticknor was not indebted to Day in any large amount, nor was Day bound as surety for him, as is stated in the conveyance, but that it was a contrivance to enable Ticknor to retain possession of his property, free from the claims of his creditors. That from the date of the deed, Ticknor has remained in possession of the property, occupying the houses, hiring, and receiving the rents, selling the groceries, and replacing the stock, and in all respects, using it as his own. That he has effects, out of which the judgment might be satisfied, but that in consequence of this pretended mortgage, it cannot be reached by execution at law, &c. &c. An injunction was granted.

The deed is made an exhibit to the bill, and bears date the 28th April, 1840. It recites, that for and in consideration of the sum of $25,000, in hand paid by Day to Ticknor, the latter conveys to the former certain lots of land in the city of Mobile, particularly described, and then proceeds thus: "And the said party of the first part, in consideration as aforesaid, hath granted, bargained,

&c. unto the said party of the second part, his heirs, &c. a certain negro woman named Minta, with her child; also, all the right, title and interest which the party of the first part, has in and to the steam-boat Factor, it being one-fourth part; also, all and singular, the stock of groceries, chandlery, goods, wares and merchandise, now being in and on the first above described premises; also, a barouche, carriage and two horses, and all the household furniture of the said party of the first part, consisting of cabinet ware, beds and bedding, paintings and engravings, silver ware, crockery and glass ware, table furniture, kitchen furniture, &c: *Provided, nevertheless*, and this instrument is made upon the express condition, and with the stipulations, qualifications and limitations following, to wit: Whereas, the said party of the first part, is indebted to the party of the second part, in sundry large sums of money, for money had and received; and also, for money paid, laid out and expended by said party of the second part, for the use and benefit of the party of the first part, and is also largely indebted to said party of the second part, on book account, and for goods, wares and merchandise sold, and sundry large amounts on bonds, bills and notes, and other contracts; and whereas, the said party of the second part, has by various endorsements of notes and other obligations, and by acceptances of bills of exchange, and by assuming to pay other debts of the party of the first part, and by becoming security on various instruments of writing at the special instance and request of the party of the first part, hath made himself liable to pay both, now and hereafter, as said liabilities may from time to time fall due, large sums of money on account of the party of the first part.

"Now, if the said party of the first part, should well and truly pay on or before the 1st day of December, 1841, all his indebtedness to the party of the second part, and shall pay and discharge all the said liabilities, so that the party of the second part shall be saved harmless therefrom; then, and in that case, these presents, and every thing and matter herein contained, shall cease, determine, and be utterly void. And it is further covenanted and mutually agreed by, &c. that the said party of the first part, and his assigns, shall and may hold and retain in his possession and use, the goods, wares and merchandise; and also, the other personal property before described and mortgaged; and also, the above described mortgaged real estate, and to occupy the same, and to

hire the same, and receive the rents therefor; and also, to sell and dispose of the goods, wares, furniture and the other personal property as aforesaid, and from the nett proceeds thereof, to pay and satisfy the above indebtedness, and the said liabilities, rendering an account thereof to the said party of the second part, as often as he may be reasonably thereto requested.

"And it is further agreed, by and between the said parties, that in case it shall so happen, the party of the first part, shall not pay or cause to be paid, his indebtedness to the said party of the second part, as aforesaid, on or before the 1st December, 1841, and shall not pay or discharge all the liabilities aforesaid, so as to save him harmless, the said party of the second part, shall be, and hereby is authorised and empowered to dispose of the above real estate, either at private sale or at auction, as he may think best, for cash, and his conveyance therefor, shall be as binding as if made by the party of the first part, giving thirty days notice of such sale in some newspaper published in the city of Mobile."

Signed and sealed by John Ticknor, acknowledged on the 26th June, 1840, before a notary public, and recorded in the county court clerk's office.

Ticknor, by his answer, admits the execution of the deed, and states the value of the property conveyed by the deed at $23,850, exclusive of bad and doubtful debts; that one of the lots conveyed by the deed, was under mortgage to its value, and therefore, not brought into the account. That one of the lots estimated to be worth $20,000, was incumbered in various ways to the amount of $16,744 03, which amount has been discharged by the defendant Day. That on the 31st December, 1839, he was indebted to Day in the sum of $10,673 60, for goods purchased and paid for by him for respondent, and in the further sum of $1,009, also, for goods purchased for him—In the further sum of $4,000, for money lent on the 14th Dec. 1838, for which he held his note—Also, in the sum of $3,000, for money lent on the 10th June, 1839, for which he held his note—In the further sum of $4,000 for money paid for him by Day to Pope & Powers, on the 27th March, 1840, and that to secure these debts, the deed was made.

He admits that he has retained possession of all the property (except the house sold under mortgage) since the date of the deed, that he has done business under his own name, and kept his books in his own name, under the direction of Day and the pro-

visions of the deed. He denies that he is in possession of any personal property upon which Day has not a *bona fide* claim, but that all the property in his possession belongs absolutely to Day. That Day has paid all the liabilities assumed by him before mentioned—that he has not reduced his indebtedness to Day in any way, although he has paid to said Day from the proceeds of the store, the sum of $10,670, but the said Day has paid more than that amount in addition to the sums herein before mentioned, for goods, &c. That the household furniture is unsold, and is worth about $400; that the stock of groceries have been sold and replaced constantly, by respondent, who carries on the business for Day, at his risk, and for his benefit; that the steam-boat was sold under a decree in admiralty, and did not bring the amount of the decree; that the two slaves, the barouche and horse, were sold, and the money applied, by the direction of Day, in the purchase of goods for the store. He denies all fraud, and insists that the conveyance was made *bona fide* to secure Day. He admits his indebtedness to complainant and others, as stated in the bill.

The answer of Day is in substance, the same as that of Ticknor.

Upon the coming in of the answers, the complainant moved for the appointment of a receiver, and the defendants moved for a dissolution of the injunction. The chancellor considering the equity of the bill to be destroyed by the answers, dissolved the injunction, and overruled the motion for the appointment of a receiver, from which order the chancellor allowed this appeal.—The appellant now assigns for error, the decree of the chancellor, dissolving the injunction, and refusing to appoint a receiver.

Peck & Clarke, for appellants. They insisted, 1st, that the mortgage, as to creditors, was fraudulent on its face; among other things, because it did not show the debt it was intended to secure, when contracted, when due, nor the amount, and if for no other reason, because other creditors have the right to pay the debt, it was made to secure and take the benefit of it, [Aik. Dig. 208, § 6,] which certainly embraces mortgages as well as deeds of trust.—They further insisted that this was in law a deed of trust, and not a mortgage.

2. If not void on its face, as to creditors, certainly it contains

many badges of fraud, which so far from being explained, are confirmed by the answers.

3. That a receiver should have been appointed. [2 Paige, 342; 4 id. 576.]

4. For the jurisdiction of the court in such a case as the present, see 20 Johns. 554, and the case there cited.

ORMOND, J.—The counsel for the plaintiff in error, insists that the mortgage by which the property sought to be reached by this bill, is conveyed to the defendant Day, is fraudulent and void, as to creditors, upon its face.

The conveyance bears date 28th April, 1840, by which, for the consideration as expressed in the deed Ticknor conveys to Day certain real and personal property, among the latter being a "stock of groceries, chandlery, goods, wares and merchandise," upon condition that, whereas, the grantor was indebted to Day "in sundry large sums of money due on book account, and for goods, wares and merchandise sold, and sundry large amounts on bonds, bills and notes and other contracts," and also for debts upon which Day was bound as his surety; but if the debts were discharged, and Day saved harmless from his suretyship, on or before the 1st December, 1841, then the deed to be void; otherwise, Day was empowered to enter and sell at public or private sale, on thirty days notice, the mortgaged property. The deed also contains a covenant, that the grantor shall retain in his possession, and use the goods, wares and merchandise, and the other property conveyed, and sell and dispose of the goods, wares, &c. and from the nett proceeds thereof, pay and satisfy the above indebtedness, rendering an account thereof to Day. The deed was executed by Ticknor only.

It is certainly a suspicious circumstance, that no schedule accompanies the deed, from which the value of the property conveyed, could be ascertained, or the amount of the debt it was made to secure, as was held by this court in the case of Cummings & Cooper v. McCullough, adm'rx, [5 Ala. 324.] It is not the usual and ordinary mode in which fair transactions are conducted, by which a debtor withdraws his property from the payment of all his debts, and confines it to the payment of one or more; and although it would not of itself be evidence of fraud,

the omission would, unless explained, add weight to any other objection that might exist to the deed.

The provision in the deed, that the grantor shall have the possession and the right to sell and dispose of the goods, wares and merchandise, and other personal property conveyed by the deed, raises a question of much graver import.

In Ravisies v. Alston, trustee, [5 Ala. 297,] a deed of trust, conveyed among other things, corn, fodder and bacon, and gave to the trustee the power to manage the plantation during the current year, and devoted the proceeds thereof to the payment of the debts, to secure which the deed was made. The court sustained the deed upon the ground that the perishable articles, corn, fodder and bacon, which would be destroyed in the use, would be re-produced upon the plantation, and sold by the trustee at the end of the year. But the court added, "we do not doubt that a stipulation in a deed of trust, reserving property for the use of the grantor, which must be exhausted in such use, is fraudulent and void. This is the doctrine of the supreme court of Tennessee, as held in 3 Yerger, 502; 4 id. 541, 8 id. 419, and Richmond v. Crudup, Meig's R. 581.

So, in Cunningham v. Freeborn, [11 Wendell, 255,] an assignment by a debtor was supported, which permitted the trustee to sell the manufactured articles of a foundry establishment, and to work up the unmanufactured, and sell them for the benefit of the preferred creditors, on the ground that the property conveyed could not readily be converted into money, in any other way, without a great sacrifice.

In De Forest v. Bacon, [2 Conn. 633,] the court sustained an assignment similar to the one just commented on, the jury having found the transaction to be *bona fide*, but asserted that such a provision from its tendency to delay and hinder creditors, was a badge of fraud. But in the two last cases, as well as in the case cited from 5 Ala. it must be observed that the conveyance was to a *trustee*, whilst here, the possession is retained by the grantor, with the right to *use* and convert the personal property into *money*, subject only to an account with the mortgagee, as often as he may be *reasonably* requested. Whatever may have been the intention, the tendency of such a conveyance cannot be doubted, nor its hostility to the rule which must govern in such cases, as laid down by this court in the case of Gazzam v. Poyntz, [4 Ala.

382; that "an assignment by a debtor, can only be sustained where the property conveyed by the deed is, by its terms, fairly and *bona fide* devoted to the payment of creditors, without stipulating for any benefit to the debtor, and where the equitable interests of the creditors are fixed and determined by the assignment itself."

This point, however, does not appear to have been raised in the court below, where the motion decided by the chancellor was made upon the bill and answer, and we will now proceed to consider the case in that aspect.

When a deed, conveying property for the payment of debts, stipulates for the possession by the grantor for a certain time, such possession being consistent with the terms of the grant, is not fraudulent, as against creditors; but if possession is retained after default, and when, by the terms of the deed, the right to it is gone, it becomes a badge of fraud. This is the well established doctrine of this court. [See Magee v. Carpenter, 4 Ala. 469, and preceding and subsequent cases.] Being a circumstance from which fraud may be inferred, it is open to explanation—how is it explained in this case? The right to possession under the deed, ceased on the 1st December, 1841; the bill was filed on the 7th February, 1843, at which time, and up to the coming in of the answers, Ticknor was in possession of all the property, doing business in his own name, selling the goods and merchandise, and keeping his books in his own name. That the stock of goods have been replaced continually by him, under the direction of Day. Indeed, it does not appear that any change whatever has taken place in his business, or the mode of carrying it on since the execution of the deed. Like other mercantile men, he sells his goods and re-invests the proceeds in other goods, which are again sold out, and again re-invested, and it seems that other personal property, the slaves, horses and carriage, have been sold, and the proceeds carried into the stock in trade.

In all this there is nothing which relieves the transaction from the imputation of fraud, arising from the possession after default. It would certainly be a singular anomaly, if a debtor could, by a mortgage or other conveyance, place his property beyond the reach of his creditors, and still use it as a capital upon which to trade in his own name, and this not only during the existence of the mortgage, but for a long period after, by default, he had

ceased to be entitled to the possession. To this Day admits, in his answer, he was privy and consenting, and if the arrangement was not a contrivance to delay and hinder creditors of their just demands, such is its inevitable tendency; and it is, therefore, as against creditors, in law, fraudulent and void.

It is true, it is stated in the answers, that the goods are the property of Day, and that the store is carried on at his risk, and for his benefit. This is probably a mere conclusion of the defendants, from the facts admitted by them, but if considered as a substantive averment of a fact, it is inconsistent with the mortgage, under which he claims, and the other admitted facts. By the mortgage he stipulated, that Ticknor should be entitled to the use and possession, and have the right to sell and dispose of the property, until default made in the payment of the mortgage debt, and until he entered for the default, and sold the property according to the provisions of the deed, he has no title to it. Nor is it pretended in the answers, that the stock of goods which has been from time to time replaced, was purchased by Day, and paid for with his own means—on the contrary, it is admitted, "that the stock of groceries, &c. have been sold and replaced, constantly, by this respondent, (Ticknor,) who carries on the business for said Day, at his risk, and for his benefit." In addition, it is stated, that from the proceeds of the sales, more than $10,000 has been paid to Day, and yet the original indebtedness is not at all reduced; which could only happen by a re-investment of the amount so paid in other goods.

Some stress appears to have been laid upon the general denial in the answer, of the possession of any effects subject to the plaintiff's demand, and upon the denial of fraud, but these are rather conclusions of the parties than facts, and at all events, are countervailed by the admitted facts which stamp the transaction, as one made to hinder and delay creditors of their just demands, and therefore, fraudulent and void.

It results from the view here taken, that the decree of his honor the chancellor, dissolving the injunction, must be reversed.—His refusal to appoint a receiver, was probably the result of the decision he came to, upon the motion to dissolve, but whether such be the case or not, it cannot be reviewed in this court, being a mere interlocutory order, not affecting, finally, the merits of the

case, which could alone give this court jurisdiction. [Kennedy v. Kennedy, 3 Ala. Rep. 434.]

But, as a refusal to appoint a receiver, in a proper case, might operate great injustice, the party aggrieved could doubtless have redress by *mandamus*, or in some other mode, by application to this court.

Let the cause be remanded for further proceedings.

GARDNER & SAGER v. ALLEN'S EX'R.

1. Where one purchases goods of a factor, under a belief authorised by the facts of the case, that the latter was the real owner, he may set-off a debt due him from the factor, to an action for the purchase money, brought either by the factor or his principal.

WRIT of error to the County Court of Mobile.

This was an action of *assumpsit*, at the suit of the defendant in error against the plaintiffs. The declaration contains a number of counts, among which were several seeking to charge the defendants for the proceeds of sixty-nine bales of cotton, which they had shipped to, and caused to be sold in Liverpool for the plaintiffs' account and benefit; in addition to which, the common counts are added. The cause was tried on the pleas of *non assumpsit*, payment and set off. A verdict was returned for the plaintiffs for five hundred and ninety-eight 20-100 dollars, damages, and a judgment was rendered accordingly.

On the trial, the defendants excepted to the ruling of the judge in his charge to the jury. It was proved that the plaintiff shipped to Messrs. Labuzan & Pollard, at Mobile, sixty-nine bales of cotton. The latter placed the cotton in the hands of the defendants to be shipped to Liverpool, and received an advance thereon. The shipment was made accordingly, and the cotton sold in Liverpool, yielding a sum sufficient to reimburse the defend-

ants their advance, and upwards of five hundred dollars in addition. For this excess, still remaining in their hands, this action was brought. Messrs. Labuzan & Pollard were commision merchants, and received the plaintiff's cotton for sale or shipment. The defendants proposed to show that they were ignorant of the plaintiff's right to the cotton in question; that they received it from Messrs. Labuzan & Pollard without the knowledge that it was not their property; and that the latter were indebted to them in the sum of five hundred dollars, or thereabouts. In consequence of this indebtedness, they resisted a recovery by the plaintiff. The court, on motion of the plaintiff's counsel, rejected the evidence offered by the defendants, on the ground that it was inadmissible.

Gibbons, for the plaintiffs in error. The evidence offered by the defendants below, was certainly admissible. If a factor deal with the goods. intrusted to him by his principal, as if they were his own, all persons to whom he thus disposes of them, may set-off, or retain to the amount of the factor's indebtedness, when an action is brought for the price, either by the factor, or his principal. He cited 7 T. Rep. 360; 1 Campb. Rep. 444; 2 id. 343; 4 B. & C. Rep. 408; 5 B. & Adol. Rep. 97; Paley on Agency, 326 to 335; How. Rep. U. S. 234; 1 Stewt. & P. Rep. 19; 10 Wend. Rep. 492; 7 Mass. Rep. 324; 13 Johns. Rep. 9 to 22; 9 Cow. Rep. 296.

Lesesne, for the defendant. A set-off cannot be made in this action, of a debt due the defendants below by Labuzan & Pollard. The statute applies only where the plaintiff is indebted to the defendant. [Clay's Dig. 283; 1 Johns. Cases, 169; 12 Johns. Rep. 276; 1 Bay's Rep. 299; 4 Cow. Rep. 496; 5 id. 231; 6 id. 261, 693; 9 id. 295; 8 Mass. Rep. 418.]

But the question is not as to the construction of the statute of sets-off, but it is, whether the defendants had a lien upon the cotton, or for a general balance due them by Labuzan & Pollard, arising out of their dealings as factors. A debt created apart from such business, would not attach as a lien. [Paley on Agency; 135–6–7; Story on Agency, 387; 3 Esp. Rep. 268.]

The case cited by the defendants in error from 10 Wend. Rep., so far as relied on here, is a mere *dictum* of the court, and in con-

flict with previous decisions in New-York. The case in 9 Cow. Rep. recognizes the correctness of the case cited from 5 Cow., and merely extends the right of set-off against the *cestui que trust.*

COLLIER, C. J.—It has been often stated, as an acknowledged principle, if a factor sells goods in his own name, the purchaser, without a knowledge of any other person being a party to the contract, in the absence of collusion, is entitled to regard the debt as due to the factor, so as in an action brought by the principal, to set-off a debt due from the factor to himself. [Paley's Agency, 326 to 335.] Mr. Justice Story, in his treatise on the Law of Agency, says, if the agent is the only known or supposed principal, the person dealing with him will be entitled to the same rights of set-off as if the agent were the true and only principal. [p. 432.] And in such case, the set-off is equally good, whether a suit be brought in the name of the principal, or of the factor or agent, for the price of the goods. [Id. 452; see, also, id. 417–8–9, and cases there cited.] In Mitchell v. Bristol & Powell, [10 Wend. Rep. 492,] the law is laid down in equivalent terms, and the court, after citing several English decisions, say, in these cases it is held, that it makes no difference whether the sale by the agent is under a *del credere* commission or not; the reason of the law is the same in both cases. But it is needless to elaborate the point at greater length. The authorities cited very fully show that it is quite immaterial whether the principal or his agent is the plaintiff. If the latter sue, the defendant may avail himself of any set-off, which he has against the former; or, if the former be the actor in the suit, the purchaser may set-off a claim which he has against the latter, *if he purchased under a just belief authorized by the facts of the case*, that the agent was the real owner of the goods. [Story's Agency, 417–8.] And this seems to be the current of decision, both in England and the United States, without regard to the extended or restricted terms of the statutes of set-off. [Caines v. Brisban, 13 Johns. Rep. 9.] This being the law, it is clear, that the court should have permitted the defendants to show that they shipped the cotton on account of Messrs. Labuzan & Pollard, under such circumstances as might well induce them to believe that it was their property. The sufficiency of this evidence was a question of fact to be con-

sidered by the jury, under the direction of the court; but, being admissible, its rejection is an error, for which the judgment is reversed, and the cause remanded.

GLIDDEN v. ANDREWS.

1. The object of the rule stated in Clay's Dig. 615 § 26, is to do away the necessity for filing a supplemental bill, when a necessary party is omitted in an original bill for the foreclosure and sale of a mortgaged estate; and it allows the introduction of a new party after the decree and sale.
2. The proper course of practice, under this rule, is to file the petition, upon which an order goes, that the person named be made a party to the original bill, and process is awarded to bring him before the court, A re-sale of the mortgaged premises is not necessrry, unless the new defendant insists on one by his answer.
3. When, under this rule, process has issued requiring the new party to answer the petition, and no process being issued on the bill against him, no decree can be rendered, as process upon the petition is a useless act, and will not warrant a decree.

Appeal from a decree of the Court of Chancery for the 1st District, Southern Division.

Andrews filed a petition, in which he set out that he was the purchaser of certain premises sold on the 1st day of June, 1843, under a decree of foreclosure made in a suit in equity, wherein he and two others, as partners under the firm of Andrews & Brothers, were complainants; and Basil Meslier, the mortgagor, Jonathan S. Beers, Adolph Batre, the New Orleans and Carrolton Railroad Company, and several others named therein, were defendants. That he is informed, Gliddon claims to have a lien upon a portion of the premises sold by the master under the decree aforesaid, which lien is subsequent to the foreclosed mortgage, under which the petitioner purchased.

The prayer is, that Glidden may appear and show cause why the sale should not be confirmed, and the petitioner be let into possession of the premises.

Glidden appears and answers the petition, asserting that he claims the premises set out in his answer, under a sale and conveyance from Adolph Batre on the 31st March, 1840; and that he has ever since been in possession of the land described, claiming it in fee simple under the title of Batre and other titles which he holds. That he was not a party to the mortgage bill, and is in no manner bound by the decree. That if he had been a defendant thereto, he would have asserted a defence which, he is advised, would have prevented a decree against him.

He prays that Andrews may produce the deed made to him by the master, whereby, it will be seen, that the former is not entitled to maintain his petition against him, and concludes with a general demurrer to the petition.

The chancellor considered the answer as evasive and insufficient, and rendered a decree foreclosing Glidden and confirming the sale; also, that Andrews should be let into possession of the premises purchased.

This decree is now assigned as error.

STEWART, for the plaintiff in error, insisted that no proceedings could be based on this petition. The party had a right to be heard on the original bill, and to be made a party to that; and even then it is doubtful if any effect can be given to the rule.

P. PHILLIPS, *contra.*

GOLDTHWAITE, J.—One of our rules for the regulation of chancery practice, directs that, "if it shall be discovered that there are subsequent incumbrancers, or parties in interest, not made parties to the cause, at any time before the confirmation of the sale in any mortgage suit, the complainant, or purchaser, shall have liberty to bring them before the court at that stage of the proceedings; and if they make no opposition by answer, their interest may be foreclosed without a re-sale of the property." [Clay's Digest, 615, § 26.]

By the usual course of chancery practice, when a necessary party defendant is omitted in the original bill, and the omission is not discovered until the suit has progressed so far, either before or after the decree, that an amendment cannot be allowed, it then

becomes necessary to cure the defect by a supplemental bill. [Mitford 33, 59; Goodwin v. Goodwin, 3 Atk. 370.]

The object of our rule is, to do away this necessity; and it, in effect, allows the amendment of a mortgage bill after the decree in such cases where the introduction of a new party will not affect the rights of those already before the court. Although the rule permits the new proceeding to be had at the instance of a purchaser as well as by the complainant, this does not introduce a new party complainant to the record. The suit progresses in the name of the original parties, with the addition of the new defendant

2. The proper course of proceeding is, for the complainant or purchaser to file a petition to the chancellor, setting forth the omission of the party deemed a necessary one to enable full effect to be given to the decree, and that such party claims some interest in the mortgaged premises which is subject to the mortgage. On this petition, an order goes, of course, that the party named be made a defendant to the original bill, and process is awarded to bring him before the court. Upon this process, the same proceedings may be had as upon *subpoena* or publication; and the suit having been already heard as to the other defendants, it is only necessary to hear it as to the new party, unless the interests of those already before the court will be affected by the decree. [Mitford 70; Jones v. Jones, 3 Atk. 217.] It will be seen by the concluding sentence of the rule, that no re-sale is necessary unless the new defendant insists on one by the answer.

3. The proceedings here do not conform to the view we have just taken of the rule, inasmuch as the process requires Glidden to appear and answer the petition, when he should have been served with a *subpoena* to answer the original bill.

No process having issued against Glidden on his thus being made a party to the original bill, no decree *pro confesso*, or otherwise, could properly be rendered against him. The process upon the petition was, as we have shown, a useless act upon which no ulterior proceedings could be based.

The decree must be reversed, and the cause remanded for further proceedings.

CASKEY, Sheriff, &c., v. The STATE.

1. In a proceeding before the judge of the county court, by a surety of a sheriff, to compel him to execute a "new bond," every fact must appear upon the record which is necessary to give the court jurisdiction.
2. It is therefore necessary that the name of the surety, requiring another bond to be executed, should be stated in the citation—that a particular day should be set for the execution of such "new bond"—and that the judgment of the county court, vacating the office of the sheriff, should state that the sheriff neglected or refused to give such new bond with good and sufficient surety.

Error to the County Court of Randolph.

This was a proceeding before the judge of the county court of Randolph, against the sheriff of the county, at the instance of one of his sureties. On the 6th of June, 1843, a citation issued to him by order of the judge, as follows:

"The State of Alabama, Randolph county.—To Robert Caskey, sheriff of Randolph county: You are hereby notified to be and appear before John D. Brown, Judge of the county court aforesaid, to give bond and security, as required by law, for the faithful performance of the duties of said office of sheriff. within fifteen days from the date of this notice, or the office will be declared vacant. One of the securities on your present bond, having filed, a written notice that he will no longer consent to be security on said bond. Given under my hand this 6th day of June, 1843."

This notice was served on the sheriff the same day.

On the 21st June, 1843, the following judgment was rendered:

"Robert Caskey having been surrendered by his securities on his official bond on the 6th instant, and notice having on that day issued to said Caskey, requiring him to come before me within fifteen days from the date thereof, and give bond, or the office would be declared vacated; and the said Caskey having failed to present such a bond as the judge of the county court believed would sustain the interest of the county, and a faithful discharge of the duties of the office—and the fifteen days, within which the said Caskey was notified to appear and give bond, having ex-

pired—the judge of the county court, aforesaid, hereby declares, as the law directs, the office of sheriff in Randolph county be vacated, and that the same will so remain, until filled by Executive appointment or election. It is further ordered, that the said Robert Caskey have due notice of the same; which notice the clerk will issue forthwith."

From this judgment, this writ is prosecuted; and the assignments of error bring to view the regularity of the proceeding.

Wm. B. Martin, for plaintiff in error.
Rice, *contra.*

ORMOND, J.—The statute, under which this proceeding was had, will be found in Clay's Dig. 534.

"§ 13. It shall be the duty of the judge of the county court, whenever application shall be made to him by the security or securities, or either of them, of any clerk or sheriff, or other officer, of any county in the State, to issue a citation to the said clerk, sheriff or other officer, to appear before him on some day therein named, not less than ten nor more than fifteen days, then and there to enter into a new bond, with good and sufficient securities, for the faithful execution of the duties of his office."

"§ 15. If any clerk, sheriff or other officer, being duly served with a citation as aforesaid, shall fail or refuse to give the bond required as aforesaid, it shall be the duty of the judge of the county court to decree the office of the said clerk, sheriff or other officer to be vacated; and shall cause an entry thereof to be made on the minutes of the county court; and such vacancies shall be filled as now prescribed by law."

By this law, a summary jurisdiction is conferred on the county court, to be exercised in a mode particularly pointed out in the statute; and, according to all our decisions on this class of cases, from the earliest period of our judicial history, every fact necessary to give the court jurisdiction, and to authorize its judgment, must appear upon the record.

The judge cannot institute this proceeding of his own mere motion, but it must be at the instance of a surety of the sheriff, making application to him for that purpose. The record must not only show this, but we think it must also appear who the surety or sureties, who wish to be discharged from further liabili-

ty on the bond, are; and of this the sheriff should have notice, that he may prepare to give additional surety. In this particular, this record is defective, as it does not appear who the surety is who made the complaint.

The proceeding is also fatally defective, because no day was set for receiving the new bond from the sheriff, the citation requiring him to appear within fifteen days from the date of the citation. In a proceeding so summary, and so penal in its consequences as this, it would be manifestly unjust that the court should have power to vacate the office, unless the sheriff had notice of the time when the court would adjudicate the matter, and such is the express requisition of the statute.

The judgment of the court, vacating the office, is also erroneous. It recites that the sheriff "failed to present such a bond as the judge of the county court believed would sustain the interest of the county, and a faithful discharge of the duties of the office." The only requisition the judge of the county court could rightfully make of the sheriff, was, that he should "enter into a new bond, with good and sufficient securities, for the faithful execution of the duties of his office." Whether the omission to present such a bond as, in the opinion of the judge, *would sustain the interests of the county*, was intended to mean that the sheriff failed or refused to execute a "new bond, with good and sufficient surety," we are unable to say. The reason assigned for the judgment, is the *opinion* of the judge, which seems to have been formed on facts in evidence before him, but which are not disclosed. But the record, in such cases as these, must state *facts*, and not conclusions or deductions from facts which do not appear; otherwise, it would be impossible that the judgment of the inferior court could be reviewed in an appellate court.

The result of this examination is, that the judgment of the county court vacating the office of sheriff of Randolph county, must be reversed.

MAGEE v. CHILDERS.

1. The act of 1833, which requires the officer taking a bond on the levy of an attachment, in the event of its condition being forfeited, to indorse the fact on the bond, is not so imperative in its requirements, as to subject the officer to a judgment on motion, unless he was informed that a bond was taken and lodged in the clerk's office; and even after such information given, he will be allowed a reasonable time to make the indorsement.

WRIT of error to the Circuit Court of Mobile.

From the record in this case, it appears that the defendant in error, on the 14th September, 1836, caused an attachment to be issued against the estate of Nelson Phillips, returnable to the circuit court of Mobile, for the recovery of a promissory note for "one hundred and forty-one 25-100 dollars, due sixty days after the 16th August, 1836." This attachment was placed in the hands of T. L. Toulmin, then sheriff of Mobile county, on the day on which it issued, who, on the same day, levied it on a negro woman named Anna. On the same day, the defendant in attachment executed a bond, with Archibald Campbell as his surety; conditioned, that if he was cast in the action, that he should return the specific property, so attached, to the proper officer, or pay and satisfy the judgment that should be rendered against him. Afterwards a judgment was rendered against Phillips for one hundred and forty-two 19-100 dollars, besides costs of suit. On the 10th January, 1837, a *fieri facias* was issued on this judgment, and placed in the hands of the plaintiff in error, who was then sheriff of Mobile, which he returned, "no property found."

At the term of the circuit court holden in the spring of the year 1843, the plaintiff in the judgment moved for a judgment against Magee, as sheriff, for the failure by him to endorse on the replevy bond executed by Phillips and his surety, that the same was forfeited—having first given five days' notice of the time when the motion would be made. From a bill of exceptions, sealed at the hearing of the motion, it appears that the bond, when taken, was, with the attachment, returned to the clerk's office, where it re-

mained until about the 14th June, 1837, when it was placed in Magee's hands, who endorsed it as follows:

"By the request of Robert G. Gordon, I demanded the negro named in the within bond of Archibald Campbell, the security to this bond—and the said negro was not given up. June 14th, 1837. WM. MAGEE, Sh'ff M. C."

That it was not shown or handed to Magee upon the determination of the suit, or when the execution was issued. It was further proved, that it had been the invariable practice in proceedings of the kind, for the clerk, or plaintiff's counsel, to hand the sheriff the bond when the execution issued, and for the sheriff thereupon to make a demand, and enter a forfeiture of the same, if the property was not delivered according to the condition. Notwithstanding these facts were shown to the court, a judgment was rendered against the sheriff, pursuant to the motion.

LESESNE, for the plaintiff in error.

COLLIER, C. J.—The act of 1812, in connection with that of 1829, enacts, that, on the forfeiture of any bond given to a sheriff or coroner for the forthcoming of property levied on by him in virtue of an execution, it shall be his duty to return the bond and execution within ten days thereafter, to the clerk of the court from which it issued, with the necessary endorsement thereon of forfeiture. And if he shall fail to comply with the provisions of the act in this respect, he shall, upon five days' notice, be liable to the motion of the plaintiff in execution, to be made before the court from which the execution issued; and, upon the default of the sheriff or coroner being shown, the court shall enter judgment against him, and such of his sureties as shall have had the notice prescribed, for the sum due on the execution, with ten per cent. damages, and all costs. [Clay's Dig. 215, sec. 73.] By the statute of 1828, it is provided, where a claim is interposed to property levied on by execution, and a trial had, it shall be the duty of the jury, in all cases, when they find the property subject to the execution, to find the value of each article separately; and if the claimant shall fail to deliver the same, or any part thereof, when required by the sheriff, it shall be the duty of the sheriff, to go to the clerk and endorse such failure on the bond which he has returned, with a copy of the execution. Whereupon, the

bond shall have the force and effect of a judgment, and execution shall issue against the claimant and his sureties, for the value of the property not delivered, with interest from the date of the verdict. [Clay's Dig. 213, § 64.] The attachment law of 1833 directs, that all replevin bonds, or bonds for the trial of the right of property, taken on the levy of an attachment, shall be lodged with the clerk of the court to which the process is returnable; and should there be any forfeiture of the condition of such bond, the officer taking the same shall forthwith enter thereon the necessary endorsement of forfeiture; and the clerk shall immediately issue execution on the same against all the obligors therein: which duties of clerks and other officers shall be performed under all the penalties and responsibilities prescribed in cases of the forfeiture of forthcoming bonds, and bonds for the trial of the right of property in other cases: *Provided*, That, for satisfactory cause shown, any of the judges may supersede such execution, either wholly or in part, &c. [Clay's Dig. 57, sec. 11.]

In respect to a forthcoming bond, it is retained by the officer levying the execution, and the appropriate return thereon, if its condition has not been complied with, is, that it is forfeited. If property, to which a claim has been asserted, has been adjudged liable to the satisfaction of the plaintiff's execution, a mandate issues for the sale thereof. In order to perform this duty, the sheriff must demand it of the claimant, and if it is not delivered, the appropriate return is made by an endorsement of the fact on the bond, viz: that its condition has been forfeited. But, in the present case, an execution issued to the sheriff requiring him to make the amount of the judgment, without informing him whether the suit had been commenced by attachment, or that a replevy bond had been executed; and so far as the execution was concerned, his duty was to make the money thereon, if possible, or return that the defendant had no property within his county from which the money could be made. In the two former cases, the sheriff is informed that there is a bond, and the law points out his duty in regard to it; in the latter, he has no such information, unless it is communicated to him otherwise than by the execution. Even if the office of sheriff should continue to be filled until after the execution was issued, by the same individual who took the bond, it is not probable that, in a county where many suits were brought, he would remember the fact of its execution; much less

probable is it, that one who succeeded him in the sheriffalty should possess such knowledge. True, it is competent for the Legislature to charge a sheriff with such knowledge, and to inflict a penalty as the consequence of ignorance; but to induce a court so to interpret its meaning, the legislative will must be expressed in terms so explicit and imperative, as to exclude construction. This, we believe, has not been done by the act of 1833. That statute requires the officer taking the bond to lodge the same with the clerk of the court to which the attachment is returnable. It then provides, that if the condition is forfeited, the sheriff, or other executive officer shall endorse the forfeiture thereon; but it does not prescribe at what precise time the forfeiture takes place, whether any, or what act is necessary in order to such a result. There is much, then, left to construction.

We will not undertake to say that the defendant in attachment and surety are not bound to take notice of the determination of that suit, and if the former be cast therein, to return the specific property without any demand thereof, and upon such default a forfeiture might not be endorsed; although no express notice has been given, or demand actually made. This question need not be considered. But we think that the statute is not so inflexible as to require the sheriff, *mero motu*, to go the clerk's office, obtain the bond and endorse it forfeited. If such were the proper construction of the act, as a prudential step, the sheriff should inquire in respect to every execution returned "no property found," if the defendant's property had been attached, and a replevy bond given. To answer this inquiry, the clerk would find it necessary to examine the papers in each of such cases. The inconvenience of such a practice, if there were no other objection, should incline us very strongly against a construction which superinduced such a consequence. Besides, would a mistake of the clerk, in giving the information, relieve the sheriff from liability?

This view has led us to the conclusion, that the sheriff is not bound to make the endorsement which the statute contemplates, until he is informed, in order that he may do so, that a bond was taken and lodged in the clerk's office. Even then, he must have reasonable time to perform this duty, and cannot be required to suspend all other business until it is done. What we have said is decisive of the case; and, without considering the other questions raised upon the record, we have only to add, that the judgment of the circuit court is reversed, and the cause remanded.

NABORS v. THE STATE.

1. A finding by the jury that the prisoner is guilty on the first charge, when the indictment contains more than one count, will be considered as affirming that he is guilty, as charged in the first count of the indictment, and not guilty as charged in the other counts.
2. One may be convicted and sentenced on an indictment for stealing a slave, as a case of grand larceny, where its value exceeds twenty dollars, and the offence is not attended with the circumstances of aggravation, specified in the 18th section of the 4th chapter of the penal code, before it was repealed and re-enacted in other terms.
3. When the term of a circuit court is limited to one week, it expires on Saturday night at 12 o'clock, as no judicial action can be had on Sunday, and a verdict rendered after that hour, is irregular, and and will not sustain a conviction.

WRIT of Error to the Circuit Court of Pike county.

Nabors was indicted at spring term, 1843, of the circuit court of Pike county, for slave stealing. The indictment contains several counts, and the first charges, that he, on the 1st day of September, 1842, in Pike county, a negro boy slave, named Nathan, of the value of three hundred dollars, of the goods and chattels of one Henry M. Herrin, then and there being found, feloniously did steal, take and carry away, against the peace and dignity of the State of Alabama.

The jury returned a verdict "of guilty on the first charge," and the court thereupon, sentenced him to seven years imprisonment in the penitentiary.

A bill of exceptions was taken at the trial, from which it appears, that the hour of 12 o'clock, on Saturday night, had arrived, and the jury being then out on said cause, and not having agreed on their verdict, as to the guilt or innocence of the defendant, he, by his counsel, moved the court to have the case arrested from the jury, on the ground that the christian sabbath had arrived, and the six days allowed by the statute for holding the court, had elapsed, and therefore, that any action by the court or jury, would be extra judicial, and of no effect. This motion was overruled, and the jury was allowed to retain the case until the hour of two

o'clock, A. M., on said Sabbath morning, when they returned with a verdict of guilty—to all which, the prisoner excepted.

HARRIS, for the prisoner, made the following points:

1. That the verdict was uncertain and insufficient.

2. That the offence charged in the first count of the indictment, is not good, under the statute, in force when the act was committed—[Meek's Sup. 220, § 18,] nor is slave stealing an offence at common law.

3. The act under which the indictment is framed, was repealed pending the prosecution. [Act of 11th February, 1843.]

4. The conviction is void, as having taken place on a Sunday, and after the term of the court had legally expired. [Ned v. The State, 7 Porter, 213; Love v. The State, 4 Ala. Rep. N. S. 173; The State v. McLemore, 2 Hill's S. C. 680; 6 American Com. Law Cases, 260, note.]

S. F. RICE, for the Attorney General, insisted, that as the indictment was good for an offence at common law, the prisoner, under the 26th section of the 8th chapter of the Penal Code, [Clay's Dig. 442, § 26,] ought to receive the statute sentence.

2. The act substituted in the place of that repealed, provides no new or additional punishment, therefore, the prisoner can be sentenced under the act in force when the offence was committed. [People v. Reader, 12 Wend. 425; People v. Phelps, 5 Wend. 10.]

3. Although the court might properly have discharged the jury under the circumstances, yet it was not bound to do so, nor is the verdict void for having been returned on Sunday morning.

GOLDTHWAITE, J.—1. The first point presented here, is not materially different from one decided by us at a previous day in this term, in the case of Nancy v. The State. There, the finding of the jury extended only to a part of the charge contained in the sole count of the indictment, yet we considered the finding as good for so much of the offence as it stated, and that it was equivalent to an acquittal of the residue of the charge. Here, the verdict clearly refers to the first count of the indictment, and may properly be considered as an affirmation of the prisoner's

guilt, in manner and form as thereby charged, and that he is not guilty of the charges contained in the other counts.

2. The next inquiry is, whether the prisoner can lawfully be sentenced to receive any punishment upon this verdict, and if any, what that punishment ought to have been.

It is said, that slave stealing, was provided to be punished by a particular statute in force when this felony was committed, but that it was afterterwards repealed. We shall not consider the effect of the repeal of the statute, because whatever that may be upon the prisoner's case, it is certain, the count under which he has been convicted, is not framed with reference to that enactment, which was in these terms: Every person who shall inveigle, steal, carry or entice away any slave, without the consent of such slave, or shall hire, aid or counsel any person to inveigle, steal, carry or entice away, as aforesaid, any such slave, with a view to convert such slave to his own use, or to the use of any other person, or to enable such slave to reach some other State or country, where such slave may enjoy freedom, such person on conviction shall be punished by confinement in the penitentiary, not less than ten years. [Meek's Sup. 220, § 18.]

Now it will be evident, on looking at this enactment, that it only covers the case of stealing a slave *without his consent*, and with *the particular views, or one of them*, indicated by the terms used. It may be asked how was the stealing of a slave *with his consent*, punished? It is in effect urged, that it was not punishable by law, as there is no statute expressly, and in terms, covering such a larceny; and it is said that slave stealing was not an offence known to the common law.

Waiving the consideration of the argument in that aspect, it is a sufficient answer that slaves have always, in this State, been considered as property, and are within the general terms, goods or chattels. When, therefore, the 57th section of the 4th chapter of the Penal Code, provides that the larceny of money, goods or chattels, &c. &c. when the value of the property stolen exceeds 20 dollars, shall be punished by imprisonment, for not less than two, nor more than five years, in the penitentiary, there is no doubt with us, that it includes all cases of slave stealing not included in the statute. We have already shown that the offence with which the prisoner is charged and convicted, is not within the statute then in force, and therefore, it is entirely immaterial, to

consider what is the effect of its repeal and re-enactment in the form we now find it. But, being convicted of grand larceny under the terms of the section before referred to, he was liable under this conviction, if it can be sustained at all, to be sentenced for a term not less than two nor more than five years.

3. The remaining question is one of considerable importance in its connexion with public morals, but more so with reference to the administration of criminal justice. The position assumed by the prisoner's counsel, is, that the circuit court should have discharged the jury from the further consideration of this case upon the coming of the hour of 12 o'clock on Saturday night, as the Sabbath then commenced, and the term expired by its legal limitation.

The act directing that the circuit court of Pike county shall be held one week, as distinguished from six judicial days, does not, as we think, authorise the conclusion that any change was intended to be made in the law, with respect to the Sabbath.—This day, from a very remote period, has, by the common law, been regarded as *dies non juridicus*, and we have been able to find no precedent where a judicial act has been sustained, if done on that day. On the contrary, there are many cases reported, where the judgment of inferior courts have been reversed, because then given. [7 Comyn's Digest, 399; Temps. B. 3.] In the case of Swann v. Broome, [3 Burr, 1595,] the subject was fully examined, and the conclusion was, that no judicial act whatever, could be performed on that day. Our difficulty has not been, that Sunday is not *dies non juridicus*, but whether this conviction ought not to be sustained from the ncessity of the case, but, perhaps, this is more imaginary than real, as the same difficulty may frequently occur whenever a term is limited. It is impossible to foresee that a jury may always agree upon a verdict before the term expires; and therefore, the difficulty would not be avoided if Sunday was stricken from the calendar. It is abundantly clear by the common law, that a jury was not necessarily discharged because of the intervention of a Sunday; and this is shown by many of the elder cases referred to by us, in the case of Ned v. The State, [7 Porter, 187,] which show that juries were carried by the judges, from court to court, in the same circuit. But when the court is limited to one week, as no judicial act can be performed on Sunday, the term necessarily expires at

the hour of 12 on Saturday night; and, in this case, when that hour arrived, nothing remained of the powers of the court, but those necessary to declare that its functions had ceased, and to remand the prisoner. It has been a serious question with us, how the precise time is to be ascertained, but there can be no other mode than to rest this matter with the presiding judge, whose opinion must of necessity be final and conclusive.

This conclusion renders it necessary that the judgment of the circuit court should be reversed entirely, and remanded for a trial *de novo*, upon all the counts of the indictment, and we may remark further, that if the verdict had been allowed to stand, no judgment could have been rendered on it, except for the punishment of grand larceny, and this is because the additional punishment provided by the 18th section of the 4th chapter of the Penal Code, creates a distinct offence, and therefore, is not governed by the 26th section of the 5th chapter.

Reversed and remanded.

ROBINSON v. GARTH.

1. Sales of land by sheriffs, under execution, are within the statute of frauds.
2. The sheriff is the agent of the purchaser, and may sign his name to a memorandum of the particulars of the sale, so as to satisfy the requisition of the statute of frauds—and a statement in writing, made by the sheriff at the time of the sale, describing the land sold by its designation at the land office—the price at which it sold—and the name of the purchaser, is a sufficient memorandum or note in writing, within the statute of frauds.
3. If the purchaser refuse to comply with the terms of the sale, the sheriff may re-sell the land, and bring an action in his own name against the original purchaser, if the land sell for less than was bid for at the first sale, for the breach of his contract---and will be liable for the amount so recovered in his official capacity, to those entitled to the proceeds.
4. In an action brought by the sheriff, after a re-sale, the memorandum of the original sale made by himself, will not be competent evidence to establish the fact that such sale was made.

ERROR to the Circuit Court of Morgan.

The action was brought by the plaintiff in error, as sheriff of Madison, to recover from the defendant in error the difference between the sum bid by him for several tracts of land, sold under execution, and the price for which they were subsequently sold on his refusing to complete the purchase.

Upon the trial, the plaintiff proved that, as sheriff of Madison county, he exposed to sale six parcels of land, as the property of John Blevins, under and by virtue of executions against him, having duly advertised the sale. That at the sale, the defendant bid the sums mentioned in the declaration, which was the last and highest bid; and that the land was knocked down to him, and that as each tract was knocked down, he made an entry of the same.

The plaintiff then offered in evidence a small memorandum book, containing an entry in the words and figures following:

"Sales of John Blevins' land, sold at sheriff's sale on Monday the 1st day of August, 1842; to whom sold; and at what price land sold.

The southwest 1-4 of section 30, township 4, range 2, east—Jesse W. Garth—$510.

Southeast 1-4 of section 24, township 4, range 1, east—Jesse W. Garth—$830.

Southeast 1-4 of section 19, township 4, range 2, east—Jesse W. Garth—$425.

Southwest 1-4 of section 19, township 4, range 2, east—Jesse W. Garth—$1100.

Northeast 1-4 of section 30, township 4, range 2, east—Jesse W. Garth—$340.

Southeast 1-4 of section 30, township 4, range 2, east—Jesse W. Garth—$335.

30 per cent. discount on specie—$3,540 00."

The plaintiff proved that the entry was in his hand writing, but the witness could not say whether the entry was the same which was made when the land was knocked down. That about an hour after the sale, the witness, and plaintiff and defendant were all in a room together, conversing about the sale; that the plaintiff produced the memorandum book—that there was then no disagreement about the purchase, but both parties spoke of it as if it was to be performed.

The plaintiff then produced a deed from the plaintiff, as sheriff,

to the defendant for the lands so sold, dated 1st August, 1842, on the back of which was the following memorandum:

"I, Jesse W. Garth, acknowledge the presentation of the within deed, and waive all formality in the matter. Augut 27, 1842.

J. W. Garth.

Test, Abner Tate."

He also proved by said Tate, that the defendant, at the same time, said that the money, owing by him for said lands, must be paid; that the Bank at Decatur was to have furnished it, but had not as yet done so. The plaintiff also proved the judgments under which the sale was made; that the sale was made by virtue of executions then in the hands of the sheriff; the tender of a deed; and re-sale of the lands, as stated in the declaration.

Whereupon the court charged the jury, that the statute of frauds was an effectual bar to the plaintiff's action upon the evidence; and that the whole, nor any part of it, was sufficient to take the case out of the statute of frauds.

The jury having rendered a verdict for the defendant, and judgment accordingly, the plaintiff prosecutes this writ, and assigns for error the charge of the court.

McClung, S. Parsons and Hopkins, for plaintiff in error, contended,

1. That sheriff's sales were not within the statute of frauds; and that if they were, the sheriff's return was a sufficient memorandum in writing. [Nichol v. Ridley, 5 Yerger; 1 Vesey, sen. 221; Roberts on Frauds, 114, note 57.]

2. That the memorandum made by the plaintiff was sufficient to take the case out of the statute, as he is the agent of both parties, and the memorandum is evidence for him in a suit brought in his own name. [7 S. &. R. 369; 7 Cowen, 310; 2 Caines, 60; 2 Johns. 284; 14 id. 48; 8 id. 520; 7 Porter, 73; 1 Howard, 210; 2 Taunton, 38; 4 id. 209; 3 V. & B. 57; 7 Leigh, 165; 24 Eng. Com. Law, 97.]

3. The recognition of the memorandum of the sale by the purchaser, when it was shown to him, is sufficient to bind him; and slight proof of such subsequent assent will suffice. [Paley on Agency, 145; Story on Agency, 245; Theo. on P. & S. 20; 8 B. & C. 448; 2 M. & R. 564; 5 Esp. N. P. C. 190; 1 Camp. 513; 3 id. 447; 4 Bingham, 727; 1 Moore & P. 761.]

4. The deed tendered to the defendant contained the contract in full, and the acknowledgment on the back of it sufficient to take the case out of the statute. [1 Bingham, 9; 1 Vesey, sr. 6; 1 Wilson, 118; 1 B. & P. 238; Roberts on Frauds, 124; 3 Atkins, 503; 9 Vesey, 253, 291; 1 Peters, 640; 1 H. & G. 139.]

5. The court erred in passing on the sufficiency of the proof. [4 Porter, 321.]

6. The sheriff was authorized to make the re-sale, and hold the defendant responsible for the difference in price. [5 Porter, 169; 7 id. 73.]

7. As it respects the right of the plaintiff to introduce his own memorandum to take the case out of the statute, they contended that the case of Fairbrother v. Simons, [5 B. & A.,] in which it was held that, when the auctioneer brought the suit, he could not introduce his own memorandum, was not sustained by the case in 2 Campbell, 203, on which it was founded; and is of doubtful authority even in England, as it was questioned in the case of Bird v. Boulton, [4 B. & A. 443,] and that on principle, the case could not be sustained.

Cooper, *contra.* Sheriff's sales are within the statute of frauds. [2 Caine's Rep. 61; 2 Johns. Rep. 248; 8 ib. 521; 2 B. & C. 945; 3 S. & P. 411.]

A party to a contract cannot act as the agent of the other party, so as to enable him to sign for the other. [2 Campbell, 203; Paley on Agency, 242; Babbington on Auc. 69, 71; Theo. on P. & S. 226; 2 Chitty's Rep. 205.]

To establish the difference between a levy and sale of goods and lands under a *fi. fa.*, he cited 5 Yerger, 227; 10 id. 328; 4 Hawks, 263; 3 Ohio Rep. 464.]

He further contended, that the sheriff could not maintain this action; but that, if an action would lie, it must be brought in the name of the plaintiff in execution, who alone was injured by the conduct of the purchaser.

ORMOND, J.—The question, whether sales of land, by the sheriff under execution, are within the statute of frauds, is one of great moment, and of some difficulty. The publicity of these sales may remove some of the dangers from perjury to which private sales of land might be subject; but this is an argument

which would apply with almost equal force to ordinary sales of land by auction, which are confessedly within the statute. There would be some more plausibility in the argument, if the sale by the sheriff, *ipso facto*, divested the title to the land out of the defendant in execution, and vested it in the purchaser; but such is not the fact. The purchaser, at sheriff's sale, acquires no title to the land until he pays for it and obtains the sheriff's deed, which the statute, authorizing the sale of land under execution, directs the sheriff to make, and which, when made, conveys to the purchaser the legal title of the defendant in execution to the land. [Clay's Dig. 205, § 17; 216, § 76.] This is very conclusive to show, that the Legislature did not intend to withdraw sheriffs' sales of land from the operation of the statute of frauds, but that such sales were to be evidenced in the same manner as other sales of land are required to be by that statute. Such has been the decision in other States on a similar statute, as shown by the citations of the defendant in error.

In Adams v. McMillan, [7 Porter, 73,] it was held, after a review of the authorities, that an auctioneer, upon the sale of land, was the agent of the purchaser; and that his writing the name of the purchaser on the memorandum of sale immediately on receiving the bid and knocking down the hammer, is a sufficient signing of the contract within the statute of frauds. The sheriff is certainly as much the agent of the parties in a sale of land under execution, as an auctioneer in an ordinary sale by auction. All the reasoning which applies to the latter, acquires increased force when considered in reference to the former, as the sheriff is not only the agent of the parties, but the accredited officer of the law, acting under the sanction of an oath. Such being the case, we are very clear that the memorandum of the sale offered in evidence, if in fact made by him at the time of the sale, was such a memorandum or note, in writing, of the contract, as would satisfy the statute of frauds. It contains all the necessary constituents of the contract—an accurate description of the land sold, the price to be paid for it, and the name of the purchaser; and would have enabled the purchaser, if, on tendering the money, the sheriff had refused to execute a deed for the land, to enforce a specific performance in equity. This renders it unnecessary that we should consider the effect of the deed, subsequently tendered

by the sheriff as a memorandum, or note in writing, under the statute.

In the case of Adams v. McMillan, [7 Porter, 88,] already referred to, it was held, that, upon the refusal of a purchaser of lands, sold at public auction, to comply with his contract, the vendor had, as an incident of the contract of sale, the right to re-sell the lands by auction—that when the power of re-sale was one of the conditions of the first sale, the difference between the two sales would be the measure of damages. If no such power was reserved at the first sale, then the difference between the two would not be binding on the jury as the measure of damages, but would be fit and proper testimony to be received by them as a means of attaining a correct conclusion, that both sales should be fairly conducted, &c.

As already observed, we are unable to perceive any difference in this respect between sheriffs' sales and other public sales of land at vendue. The decision, therefore, above quoted, applies to this case, and is, in our opinion, in point, as to the right of re-sale. [See, also, School Commissioners v. Aikin, 5 Porter, 169.]

Has the sheriff the right to maintain an action for the breach of this contract? Upon this point of the case, we have felt much difficulty. An auctioneer has such an interest in the article entrusted to him for sale, as will enable him to maintain an action for the purchase money against the purchaser, although the owner of the goods be known. This principle was first asserted in the case of Williams v. Millington, [1 H. B. 81.] The Chief Justice, in the course of his opinion, says: "It is not a true position that two persons cannot bring separate actions for the same cause. The carrier and the owner of goods may each bring actions on a *tort;* the factor and owner may each have actions on a contract." And by the whole court, the action was held to be maintainable. [See, also, Coppin v. Walker, 7 Taunton, 237; and Coppin v. Craig, ib. 243.]

The sheriff, like the auctioneer, has not only an interest in the thing sold and the proceeds to pay his commissions and fees of office, but he has an interest and right to the proceeds of the sale, as the appointed organ of the law for that purpose, to enable him to obey its mandate and bring the proceeds into court. We do not doubt that those for whom the sheriff acts, and who are interested in the money to be recovered, may also maintain the ac-

tion; but, in practice, great, if not insurmountable difficulties would be encountered if the action were brought in the name of the plaintiff in execution. It would frequently happen that many persons, as plaintiffs in execution, would be interested in the same funds; and, if not sufficient to satisfy all, the most embarrassing questions would arise in settling priorities of rights, as it would be necessary that each should sue separately. All these difficulties are avoided by considering the sheriff, as in fact he is, a trustee for the benefit of all interested in the fund. The money, when received by him, would be received in virtue of his official character, and for which he would be responsible as for money received by virtue of a sale under execution.

There is still remaining a question of considerable difficulty. It is whether the memorandum of the contract of sale, made by the sheriff, can be offered in evidence, when the action is brought in his name. In Wright v. Danah, [2 Campbell, 203,] the memorandum of the sale, relied on to take the case out of the statute of frauds, was made by the plaintiff, the defendant overlooking him and approving it. Lord Ellenborough held, that the agent must be some third person, and could not be the other contracting party.

In Fairbrother v. Simmons, [5 Barn. & Ald. 333,] the precise question we are now considering was presented, the memorandum being made by the auctioneer, and the suit being in his name. The court held that, although the auctioneer may be considered as the agent and witness of the parties, yet when he sues as one of the contracting parties, he cannot maintain the action by his own testimony.

Some doubt is thrown over these cases by the remarks of the judges in the case of Bird v. Boulter, [4 Barn. & Adol. 443;] but the question was not presented in that case. The action was by the auctioneer, but the memorandum of the sale was made, not by the auctioneer, but by his clerk, who was, by the court, considered as the agent of the purchaser for that purpose. The difficulty which seemed to press upon the court in regard to the cases of Wright v. Danah and Fairbrother v. Simmons, was, that the liability of the purchaser should not depend upon the fact, whether the action was brought by the auctioneer or the owner of the goods; and that is certainly true. But the point under consideration in those cases, as in this, was not whether

the defendant was liable, but whether it was competent to establish that liability by the testimony of a party to the record. That is a question about which it is apprehended but little difficulty can be entertained. The sheriff, as plaintiff on the record, was liable for the costs of the suit, and had also a direct interest in the event of the suit, being entitled to a portion of the money sought to be recovered, and, upon well established principles, was incompetent either to testify orally to the jury in support of the interest he represented, or to give evidence of an admission or declaration made by him previous to the suit being brought, having the same object in view.

These principles are so universally recognized, that no doubt whatever could have arisen as to their correctness, but from the fact that the memorandum made by the sheriff would have been competent evidence of the fact of the purchase of the lands by the defendant, if the suit had been in the name of the plaintiff in execution, or of some one having an interest in the proceeds of the sale. Evidence, to be competent, must be so, not only as it regards the subject matter of the suit, but also in reference to the parties on the record. In Blann v. Beal, [5 Ala. 357,] a father brought a suit against the clerk of the county court for issuing a license to marry his daughter, under the age of eighteen years, without his consent. To prove the age of the young lady, he relied on a memorandum made by himself in the family register of births many years before. The court held, that although this memorandum would have been evidence of the facts recited in it, in a suit in which he was not a party, as a declaration *ante litem motam*, by one who knew the fact and had no motive to misrepresent it, that it was not evidence for him in a suit in which he was a party on the record. The principle of that case is the one involved in this, and is conclusive to show that the evidence was inadmissible in this suit.

It results from this examination of the cause, that the charge of the court was, in substance, correct, as the memorandum made by the sheriff was not evidence in this cause to take the case out of the statute of frauds; and the judgment is, therefore, affirmed,

WASHINGTON v. COLE.

1. Where a witness (whose deposition was taken,) stated that he attended a negro, as a physician, whom the declaration alleged had been falsely warranted sound, upon a sale by the defendant to the plaintiff—*Held*, that the evidence of professional character was sufficient to authorise the admission of the evidence; and if this fact was controverted, the opposing proof should be addressed to the jury.

WRIT of Error to the Circuit Court of Tuskaloosa.

This was an action of assumpsit at the suit of the defendant in error, against the plaintiff, for the breach of a parol warranty of a slave sold by the latter to the former, for the sum of five hundred and fifty-three dollars. The cause was tried on the plea of *non assumpsit*, the jury returned a verdict for the plaintiff, for the sum of six hundred and eighty-one dollars and eighty nine cents, and a judgment was thereupon rendered. On the trial, the defendant excepted to the ruling of the court in the admission of a deposition of John Meek, which had been taken at the instance of the plaintiff. The witness stated, that as a physician, he attended upon a negro boy named George, the property of the plaintiff, from the 15th of May to the 19th of June, 1841, that the disease was dropsy, a complaint which frequently exists in the human system long before it developes itself, and in the case of George, appeared to be of long standing. Witness futher stated, that the boy was at his house during the period of his attendance, was well attended to, and on the last mentioned day, died; that his death was occasioned by the dropsy, and witness' charge for his services was ten dollars. The defendant objected to the reading of so much of the deposition as professed to express the medical opinions of the witness, there being no proof of his being a regular physician, but it was permitted to be read. Afterwards, physicians were examined, who stated that the deponent was sometimes called Doctor—that he attended to a drug store some years ago in Tuskaloosa, but was not a physician. The defendant again objected to his deposition, but his objection was overruled.

P. Martin and Huntington, for the plaintiff in error.
W. Cochran, for the defendant.

COLLIER, C. J.—The opinion of a witness is not in general admissible—he must narrate facts. But on questions of science and some few others, persons of skill may speak, not only as to facts, but are allowed to give their opinions in evidence. [1 Phil. Ev. 290; Jefferson Ins. Co. v. Cotheal, 7 Wend. Rep. 78; Crowell v. Kirk, 3 Dev. Rep. 357; Ramadge v. Ryan, 9 Bing. Rep. 333; McNally's Ev. 225 to 229.] In Morse v. The State, [6 Conn. Rep. 9,] a witness was permitted to testify that he thought a third person was a minor, between fourteen and seventeen years of age; but the appellate court held that the evidence was inadmissible—it being a mere statement of opinion abstracted from fact. If the witness had stated facts indicative of the age of the party, accompanied with his opinion or belief, the testimony would then be competent. In Brabo v. Martin, [5 Miller's Rep. 275,] the question was, whether one medical gentleman could testify as to the professioual reputation of a witness who had been examined in the same cause. The court said, the general rule is, that facts are to be proved to a jury, but an exception is made on a question of purely professional science; the opinions of a physician are evidence, but they must state the facts on which they rest, that the jury may understandingly determine the weight to which they are entitled. But the exception did not go so far, as to tolerate the inquiry proposed; if it were allowed, another witness might be called to give his opinion as to the capacity of the second, to form a correct opinion on the weight due to the testimony of the first witness, and so on without limit, as to number. "The jury are to judge of the weight due to the opinion of medical men on the disease, from the facts detailed by them, and the reasons given in support of their conclusions, not from the opinions others may form of their capacity." [See also, Corlis v. Little, 1 Green's Rep. 232.]

In respect to matters of opinion founded on peculiar knowledge, it is said that the court should first ascertain whether the witness be an expert, that is to say, skilled in the matter about which his opinion is desired. [2 Phil. Ev. C. & H's Notes, 761.] In Mendum's case, [6 Rand. Rep. 709,] it was objected that the witness' skill and experience as a surgeon, was not such as to war-

rant the court in taking his opinion. It was proved, that the witness had graduated as a surgeon at the University, where ample means existed for surgical instruction—that he practiced medicine and surgery seventeen years in the country, that he had performed surgical operations, sometimes with ,and occasionally, though seldom without the aid of others. He stood high as a physician in his neighborhood, and was confided in as a surgeon, &c. Another surgeon testified as to his standing. The witness himself was interrogated as to his particular practice, and though he had never actually inspected a stab made by a knife or dirk, he was allowed upon his general knowledge and experience, to give his opinion whether the particular wound was made by the one or the other.

As to the influence to which the testimony of the witness, Meek, was entitled, that, supposing his opinion to have been admissible, is a question which addressed itself to the jury; but his competency to express his opinions as evidence, depends upon the fact, whether he is skilled in the matter to which they relate. The proof to that point is this, "Did you, as a physician, attend upon a negro named George, &c.?" To which the witness answered, "I did." This is an affirmative answer, and an implied assertion, that the witness was skilled in the healing art by profession, and attended professionally upon the negro. True, the deposition would have been more technically regular, if the witness had been formally asked if he was a physician. But the defendant had notice of the time and place of taking the deposition, might have been present, and proposed such questions as he thought proper, and objected to such as were improper, and he shall not now be allowed to avail himself of an irregularity which is rather formal than substantial. [See Towns & O'Brien v. Alford & Butler, 2 Ala. Rep. 381.]

The evidence then, that the witness was an *expert*, so as to admit his opinions in evidence, was *prima facie* sufficient. The proof that he was called "Doctor," had attended "in a drug store," but was not "a physician," addressed itself to the jury, and under a proper direction from the court, should have induced the jury to accord but little weight to the professional opinions of the witness. But this course seems not to have been taken in the circuit court; instead of asking a charge upon the effect of the evidence, the court is called on to say that it overbalances the preliminary

proof contained in the deposition, and to reject the deposition, except so far as it states facts. This motion was properly overruled, and the consequence is, that the judgment of the circuit court is affirmed.

HODGES v. DAWES & CO.

1. One who purchases goods in the name of another, is not liable to be charged as a partner, although he is to receive one-half of the nett profits of all the purchases made by him, if it appears that he is in fact an agent only, and that the agreement to share the profits is only a mode of compensation.

WRIT of Error to the Circuit Court of Mobile county.

Assumpsit by Dawes & Co. against Hodges, to recover the amount of an account for a carriage and setts of harness.

At the trial, the deposition of one Mitchell, was offered by the plaintiffs, and resisted by the defendant, upon the ground that the witness was interested in the event of the suit.

The witness deposed, that he was the agent of the defendant, under a written power of attorney, which he produces and proves. Under this he purchased a carriage and setts of harness from the plaintiffs, to be paid for by three drafts, drawn by him on the defendant. The bill was made in the name of the defendant, and the drafts given, but not accepted or paid by the defendant, as he informed the witness. Neither of them had been paid by the witness, nor had payment been demanded from him.

Upon cross examination, he deposed, that he had half the profits of the business after expenses were paid; these were his commissions; this was the agreement under which he made purchases of carriages and harness for the defendant; there were no articles of agreement between the witness and the defendant, but the terms stated were made verbally, and the witness, according to them, undertook to do the business. Witness shared in the profits and losses made in the business, but does not recollect that

any thing was said about sharing losses at the time the witness and the defendant entered into the agreement. The defendant stated, there would be no losses; on a final settlement of witness' business with the defendant, he shared the losses as well as the profits. If there had been no profits, he would not have been entitled to pay from the defendant.

On the direct examination being resumed, the witness deposed that it did not occur to him when the agreement was made, that he was to be responsible for losses, because the defendant said, there would be none, and he first received information that he would be held responsible for losses when the defendant wrote him, that paper had been taken for carriages which was not paid, and for which the witness would be charged his share of the loss.

The deposition was admitted, and this is now assigned as error.

LESESNE, for the plaintiff in error, insisted, that the witness was a partner, to all intents and purposes, and liable to the plaintiffs as such; therefore, he is directly interested in making as many more liable to them as he can. [Marquand v. Webb, 16 John. 89; Ripley v. Thompson, 12 Moore, 55; Pool v. Lewis, 1 Ala. Rep. N. S. 65.]

P. HAMILTON, *contra*, insisted, that there was no partnership *inter se*, by the understanding of the parties. If not partners *inter se*, will they be regarded as such as to third persons? [Collyer on Part. 14, 20; 17 Mass. 206; 10 John. 226; 3 Kent, 33; 3 Pick. 435; 6 ib. 335; Story on Part. 47 to 75.]

But if the witness is a partner, is not the defendant, after constituting him an agent, estopped from denying that character? To do so now, involves the plaintiffs in the dilemma of finding other proof of their demand, than the person with whom they dealt as agent.

GOLDTHWAITE, J.—We were strongly inclined at first, to consider the witness in this case and the defendant, jointly liable as partners, to the plaintiffs for the price of the goods purchased by the former in the name of the latter; and that as a consequence of his liability as a partner, the witness was not compe-

tent to fix a liability on another in the same relation. [Lewis v. Post & Main, 1 Ala. Rep. N. S. 65; Ripley v. Thompson, 12 Moore, 55; Marquand v. Webb, 16 John. 89.] But, subsequent reflection has satisfied us that he is not in any manner liable to the plaintiffs, at least, that he is not so from any thing disclosed on the record.

There is much difficulty in ascertaining the precise condition of the law in England, or rather, the exact state of decision upon the liability of parties to third persons, in consequence of a supposed participation or right of participation in the profits of a business. It is certain, there is much difficulty in reconciling all the decisions, even if there is not an absolute disagreement between them. The case of Gaddis v. Wallace, [2 Bligh. 270,] does not seem to differ in any material respect from the case before us.—Lord Eldon, though strongly opposed to the doctrine himself, concedes it to be settled, that if a man stipulates, that as the reward of his labor, he shall have not a specific interest in the business, but a given sum of money, even in proportion to a given *quantum* of the profits, that will not make him a partner; but if he agrees for a part of the profits, as such, giving him the right to an account, though having no property in the capital, he is as to third persons, a partner. [*Ex parte* Hamper, 17 Vesey, 404.] The American cases, though here, too, there is a contrariety of decision, in the main advance the same doctrine which is conceded by Lord Eldon, and in many cases present a state of facts not readily distinguishable from those which arose here. [Perrine v. Harkerson, 6 Halst. 181; Rice v. Austin, 17 Mass. 197; Turner v. Bissell, 14 Pick. 192; Baxter v. Rodman, 3 Pick. 435; Loomis v. Marshall, 12 Conn. 69; Vanderburg v. Hall, 20 Wend, 70.] Mr Chancellor Kent says, that to be a partner (as to third persons) one must have such an interest in the profits, as will entitle him to an account, and give him a specific lien or preference in payment over other creditors. [3 Kent's Com. 4 ed. 25, n. b.] And Mr Justice Story, after a very able examination of the whole subject, concludes, that where one party is stripped of the powers and rights of a partner, and clothed only with the more limited powers and rights of an agent, it seems harsh, if not unreasonable, to crowd upon him the duties and responsibilities of a partner, which he has never assumed, and for which he had no reciprocity of reward or interest. [Story on Part. 74.]

A fair interpretation of the contract between the witness and the defendant, will not justify us in considering him in any other relation than a mere agent, and the stipulation that he should be compensated by half the profits upon the business carried on by him as agent, which he says were his commissions, invests him with no *community of interest* in them. He has no right to control them in any manner, and in the event of the bankruptcy of the defendant, he would be entitled to no preference over any other creditor. [Smith v. Watson, 2 B. & C., 401.] It is certainly true, that an agreement to share in the losses, has been considered, and probably is, inconsistent with the idea of the profits being allowed as a mere compensation. [Waugh v. Carver, 2 Hen. Black, 235.] But nothing more can reasonably be inferred from what was said between the parties when considered in connexion with the agency, than that the losses were to be deducted from the profits, and one half the residue paid to the witness. It was upon this basis that their settlement was made, as it seems to us, in entire accordance with the law of the case. We conclude then, that the witness was merely the agent of the defendant, and that on this part of the case, no objection can be sustained to his competency.

On the other points made, it may be said that no liability appears upon the record on account of the drawing of the bill, and as to his liability as a purchaser, without disclosing his agency, that is not sustained by the proof, inasmuch as it shows the purchase was made in the name of the defendant.

Judgment affirmed.

BLACKWELL, Adm'rx v. VASTBINDER.

1. A citation to an administratrix, which calls her "to make a showing of how and in what manner she has administered and disposed of the estate of the deceased, will not authorize the judge of the county court, on her failing to appear, to make a final settlement of the estate.

2. When an administrator is cited for final settlement, and fails to appear, no final judgment can be rendered at the return of the citation; but the judge should proceed and state the account, and cause notice to be given him that unless he appeared at the next term of the court, and filed his accounts and vouchers for settlement, the account so stated would be reported for allowance.
3. A decree for the wife's distributive share must be rendered in favor of husband and wife.

ERROR to the County Court of Washington.

This was a proceeding by the defendant in error against the plaintiff in error, for a settlement of the estate of the defendant's wife's father.

The petition of the defendant in error to the Judge of Washington county court, is as follows: The petition of William G. Vastbinder, of the county of Baldwin, sheweth, that by a recent marriage with one of the heirs of Nathan Blackwell, dec'd, he has become interested in the final settlement of said estate. That the said Blackwell died intestate, seized of an estate in Washington county, on or about the year 1808—that Priscilla Blackwell, wife of said Nathan, became administratrix of said estate—that the court house and clerk's office of Washington county, was during this administration destroyed by fire, so that all the papers relative to said administration were destroyed—that James and David Blackwell, sons of the deceased, have been managing the estate much to the prejudice of the other heirs—that since his marriage, petitioner has frequently requested a settlement of the estate, both from the administratrix and her sons, which they refuse to make, and prays that the administratrix may be brought before the court, and compelled to account, &c.

Upon this petition, a citation issued to the administratrix, and was executed as follows: "You are hereby commanded to make known unto Priscilla Blackwell, administratrix of Nathan Blackwell, dec'd, if to be found in your county, that she is hereby required to appear before the Honorable the Judge of Washington county court, on the 3d Monday of July next, and then and there make a shewing, of how and in what manner, she has administered and disposed of the estate of said deceased. And further, to do and perform the orders and decrees of said court."

The administratrix failed to appear, and at the July term the Judge proceeded to a final settlement of the estate, taking as the

basis of the settlement, a paper found among the records of the office, which purported to be an inventory of the personal property of the deceased, amounting to the sum of $1,435 25, and rendered a judgment in favor of the defendant in error, against the administratrix, for one fifth part thereof, with interest from the 5th October, 1807.

From this decree, this writ is now prosecuted. The assignments of error are, 1. The court of Washington had no jurisdiction.

2. The citation was illegal, informal, and insufficient.

3. There was no proof of any liability on the part of the plaintiff in error.

4. The court erred in rendering judgment in favor of one distributee, without including the others.

5. In not giving the notice required by law.

6. In rendering judgment in favor of the defendant in error, without including his wife.

LESLIE, for plaintiff in error, cited 3 Ala. Rep. 670; 4 id. 632; 4 Porter, 332; Clay's Dig. 226, § 28; id. 223, § 11; id. 304, § 42, 44; 1 Ala. Rep, 594.

ORMOND, J.—In Taliaferro v. Bassett and others, [3 Ala. Rep. 670,] it was held by this court, that the orphan's court had no power to cite an administrator to a settlement, unless appointed by the court issuing the citation, and that the jurisdiction of the court must appear upon the record In this case, it might perhaps be inferred, in support of the judgment below, from some parts of the record, that the plaintiff in error derived her appointment from the county court of Washington, but as the case must be remanded on other grounds, when the petition may be amended, by alledging expressly that such was the fact, we forbear going into this inquiry.

The citation which issued to the administratrix was clearly insufficient to authorize the Judge of the county court to proceed and make a final settlement of the estate in her absence. The citation does not inform her that a final settlement is to be made, and require her to file her accounts and vouchers, but she is required "to make a showing of how, and in what manner, she has

administered and disposed of the estate of the deceased," but for what purpose this scrutiny is demanded, she is not informed.

If this difficulty could be surmounted, all the subsequent proceedings are wholly irregular. It was the duty of the Judge of the county court upon the failure of the administratrix to appear in obedience to the citation, to proceed and state the account, and cause notice to be given to her, that unless she appeared at the next term of the orphans' court and filed her accounts and vouchers for settlement, the account so stated would be reported for allowance. [Clay's Dig. 230, § 48.] Instead of which, the Judge proceeded from the evidence before him, to render final judgment against the administratrix at the return term of the citation.

There is error also, in the judgment, which should have been rendered in favor of the wife as well as the husband.

Let the judgment be reversed, and the cause be remanded for further proceedings.

HUBBERT, AND ANOTHER, v. McCOLLUM.

1. In an action for the recovery of land, purchased under a *fieri facias*, against the defendant in execution, it is not allowable for the latter to impeach the deed by showing an irregularity in the sale and proceeding preparatory thereto; and the purchaser's knowledge of the manner in which the levy and sale were made, will not authorise the application of a different rule.
2. The irregular execution of a *fieri facias* may be corrected, or avoided by a seasonable application to the court from which it issued.

WRIT of Error to the Circuit Court of Fayette.

This was an action of trespass, at the suit of the plaintiffs in error, to try the title to certain tracts of land, particularly described in the declaration, as well as to recover damages of the defendant, by reason of the occupancy of the same, by him. The cause was tried upon the plea of "not guilty, and a verdict returned for the defendant, on which a judgment was rendered. From a bill of exceptions, sealed at the trial,

it appears that the plaintiffs read to the jury a judgment of the Circuit Court of Fayette, in favor of James Hogan, ex'r, &c. against, the defendant, and the plaintiff, Caple, for $3,655 66, and then introduced a writ of *fieri facias* issued thereupon, on which was indorsed a levy of the same on the lands in question, bearing date the 7th August, 1840. This levy was made by the plaintiff, Hubbert, the then sheriff of Fayette, although his office expired on the first Monday of August, 1840, the day on which his successor was elected. The execution was placed in the hands of Hubbert, in July preceding; R. H. Poe, his successor, gave bond, and qualified on the 10th August, and shortly thereafter it was transferred to him.

Poe was introduced as a witness, and stated that when he received the *fi. fa.* with the levy thereon, he did not consider the levy to be legal; consequently, he erased the name of Hubbert, wrote his own name under the indorsement, and adopted the levy as his own: that as it was not his custom to do so, he believed he did not go upon the land. On the execution it appeared as a part of Poe's return, that he sold the land to the plaintiffs on the 5th October, 1840—they being the highest bidders. There was evidence to show that Caple alone bid off the land, but after it was cried out he directed the sheriff to charge it to himself and Hubbert.

The court charged the jury that the levy by Hubbert was regular, and under it the land should have been sold; that his successor had no right to erase his name, and until that levy was disposed of, no other could be made; that the power to levy the execution was exhausted by what Hubbert had done, and it was not competent for Poe to adopt the act of his predecessor as his own: whereupon, the plaintiff excepted.

The plaintiff's counsel prayed the court to charge the jury, that the levy was merely voidable, and consequently sufficient to make their purchase and title good. Whereupon, the court charged the jury, 1. That a levy made by one who has no right to make it, is void; but whether void or voidable, in the present case, is immaterial, as the defendant himself is seeking to avoid its effect. 2. That although a stranger might be protected in his purchase, when the levy and sale were unlawful,

yet the present plaintiffs did not stand in that situation—Caple being a defendant in the execution, and Hubbert having levied it, they were presumed cognizant of every thing that was done under pretence of its authority.

The plaintiffs' counsel prayed the court to charge the jury further, that if they believed that Caple alone purchased the land, and afterwards allowed Hubbert to participate therein, his title would be unaffected by any irregularity in the proceedings, unless he was cognizant of, and consented to it. In answer to which, the court instructed the jury, that although Caple was the actual bidder, if Hubbert was his partner, and had the same interest in the purchase, they both stood in the same situation, and whatever knowledge, or the want of it, would prejudice the one, would alike affect the other. For the refusal to charge, as prayed, as well as to the instructions given to the jury, in lieu thereof, the plaintiffs excepted, &c.

L. Clark, for the plaintiffs in error.—A purchaser, at a sale, under execution, is only obliged to take notice that there is a judgment, execution, and levy, *in fact*—he will not be prejudiced by any irregularity in the levy. The levy by Poe, from the indorsement on the *fi. fa.* appeared to be entirely sufficient; but if it was not, that made by Hubbert was regular, and the sale by the former was legal. If the proceedings, under the execution, are objectionable, they are, at most, merely erroneous, and voidable: but certainly not void. [2 Bay's Rep. 441; 1 Nott & McC. R. 12, 408; 1 Hill's So. Caro. Rep. 239, 304; 4 Cranch, 333; 4 Wheat. Rep. 503; 3 Caine's Rep. 273; 2 Ala. Rep. 676; 8 Johns. Rep. 281; 13 Id. 97; 17 Id. 167–9; 1 Id. 45, n; 1 Johns. Cases, 153–5; 1 Cow. R. 622.]

Huntington, with whom was P. Martin, for the defendant. 1. By the common law, a sheriff continued in office until he received *a writ of discharge*, and any act done by him previous to that time, even after the writ had issued, was legal. In this State, the Constitution limits the tenure of that officer to three years, and the qualification of a successor (the term having expired,) operates so as to discharge his predecessor, without a writ for

that purpose. [Bondurant v. Buford, 1 Ala. Rep. 359; Purl's lessee v. Duval, 5 H. & Johns. Rep. 69; 1 Salk. Rep. 323; 2 Ld. Raym. Rep. 1074; 2 Bay's Rep. 120; Bacon's Ab. title Sheriff, (J.): Boucher v. Wiseman, Cro. Eliz. Rep. 440.]

2. The sheriff who levies an execution must perfect what he has begun, although he ceased to be sheriff before the day of sale. [Bacon's Ab. tit. Sheriff, (J.) Bondurant v. Buford, and Purl's lessee v. Duval, *ut supra.*]

3. If Poe sold, under the levy made by his predecessor, the sale was void; because the execution of the *fi. fa.* should have been completed by the latter: and the same result must follow, if he sold upon a levy made by himself, for the execution being levied by Hubbert, could not have been again levied by his successor, at least, upon the same property.

But whether the levy be considered the act of the one sheriff or the other, it is alike irregular. To constitute a levy, the sheriff must do enough to render himself chargeable as a trespasser, except for the protection afforded him by the process under which he acts. [Bacon's Ab. tit. Sheriff, (J.); Westervelt v. Pinckney, 14 Wend. Rep. 123.]

COLLIER, C. J.—After an examination of the authorities touching the power of the court over its final process, we said, [in Mobile Cotton Press, &c. v. Moore & Magee, 9 Porter's Rep. 692,] 1. That a party injured by the improper execution of a *fieri facias*, may obtain redress, on motion to the court from which the writ issued. 2. That a sale of land will be set aside, where the sheriff is guilty of a mistake, irregularity, or fraud, to the prejudice of either party, or a third person. 3. So, the misrepresentation or fraud of a purchaser, furnishes just ground for invalidating the sale. In Ware v. Bradford, [2 Ala. Rep. 682,] this court say, "it may be assumed as settled law, that a sheriff's deed cannot be collaterally impeached for any irregularity in his proceedings, or in the process under which he sells. All that is essential in such case, is a judgment, execution thereon, levy, and the sheriff's deed." All other questions are between the parties and the officer executing process; and either party aggrieved has an adequate re-

medy against him for damages. But if the defendant in execution would invalidate the sheriff's deed for irregularity in the execution of a *fieri facias*, it *must* be by a direct proceeding, having that object in view. To the same effect are the cases of Fournier v. Curry, [4 Ala. Rep. 321,] and Foster v. Mabe, [Ib. 402.]

These cases very satisfactorily show, that the party to final process, who objects to the manner in which it has been executed, must apply directly to the court from which it issued, either to correct or set it aside. Here, the defendant does not present his objection in that form, but waits until an action is brought against him by a purchaser under the execution, and then seeks collaterally to impeach the sheriff's deed, by showing an irregularity in the sale and proceedings, preparatory thereto. It has been supposed that the fact of the plaintiffs' knowledge of the manner in which the levy and sale were made, should place them in a less favorable attitude, and that the defendant might collaterally impeach their validity. Conceding that the plaintiffs were aware of all the circumstances, and still we cannot conceive that the rule of law we have noticed, would be inapplicable. The reason applies, as well where the purchaser possessed a previous knowledge, as where he was ignorant of the irregularity in the proceedings of the sheriff.

In respect to the time when the court should be moved to correct or avoid the execution of such process, it is not necessary, so far as this case is concerned, to determine. We may, however, remark, that the motion should be made within a seasonable time—most regularly, at the first term succeeding the return of the process. We will not, however, undertake to say, that there might not be circumstances, under which the court should interfere at a subsequent term; especially, if there are sufficient reasons for not having sought its action earlier. Beyond this, the present case does not require the expression of an opinion.

From this view, it results, that the Circuit Court should have instructed the jury, that the sheriff's deed could not be defeated by any irregularity, either in the levy or sale, under the *fieri*

facias, which was shown by extrinsic proof; or rather such evidence should have been excluded. The consequence is, the judgment must be reversed, and the cause remanded.

SEAWELL v. HENRY.

1. When bank notes are offered in payment, and no objection is made *on that account*, it is a good tender; and this although the Bank is in a suspended state; for by the conduct of the party, his adversary is lulled into security, when if objection had been made for that reason, specie would have been demanded.
2. The bill of exceptions is prepared by the party excepting, and need only state so much of the case as is necessary to show error; therefore, when error is shown, a reversal will not be withheld, because in another aspect of the case, the error complained of would be immaterial.

WRIT of Error to the Circuit Court of Mobile county.

Action of detinue, by Henry, to recover a slave from Seawell.

At the trial, upon the general issue, Henry gave in evidence a writing, with Seawell's signature, in these words: "Received, Mobile, 5th July, 1841, of George G. Henry, two hundred and fifty dollars, in full, for a negro man named Tom, aged about 24 years; which negro I warrant a slave for life—the title to defend against the claims of all persons, and I believe free from any disease. Witness, Joel A. Roberts."

It was also in proof that the slave was delivered to the plaintiff, and remained with him until the latter part of October, when he was hired to a steam-boat, from which he runaway. There was also evidence tending to prove that, afterwards, about the last of November, the slave came into the defendant's possession, and was demanded by the plaintiff before suit brought.

The defendant then gave in evidence a writing in these terms:

"Mobile, July 5th, 1841. I have this day witnessed an agreement between Mr. K. B. Seawell and Mr. George G. Henry, in which it is understood the latter will sell to the former a cer-

tain man named Tom, aged about 24 years, for 250 dollars, if applied for on the 1st day of January next.

JOEL A. ROBERTS."

And proved by said Roberts that this last instrument was in the proper hand-writing of Henry; that it was signed by Roberts at his request, and made and delivered, at the same time as the first writing, to Henry, and was a part of the same transaction. Henry insisted on a clear title, and the bill of sale was so given. The defendant also proved that Roberts was then, and at the time of the trial, the principal clerk of Henry, attending to his general business, selling goods, collecting money, and was the only person in Mobile who attended to Henry's business, when the latter was absent from the city. Also, that on the 1st day of January, 1842, Seawell put 250 dollars in the hands of one Douglass, to be paid to Henry for the slave Tom, in pursuance of the contract, and that Douglass, in the last business hour of that day, went with the money, to Henry's store, to pay him, but found no one there; that he then immediately went with Seawell to the house of Roberts, and produced and tendered the $250 to him, as Henry's agent. Roberts acknowledged the tender, and made no objections to the money, but declined receiving it, saying, he preferred it should remain in Douglass' hands until Henry's return. Henry was then absent from the city; the money remained with Douglass until the Monday following, when he called on Henry, who had returned in the meantime, and produced and offered to pay him the 250 dollars, for the slave Tom, on Seawell's behalf. Henry refused to receive it. The money was in Alabama State Bank bills, but no objection was made to it, on any account, either by Henry or his clerk.

On this state of proof, the court charged the jury, that if they believed the sale was a conditional one, that, in law, was a mortgage, and the defendant had a right to redeem—that payment would have to be made on the 1st day of January, 1842, and that a legal tender of money, by the defendant, on that day, would be equivalent to the payment or satisfaction of the mortgage; and that the plaintiff being absent, a legal tender, at his place of business, or to his authorised agent, on that day, was sufficient. On the motion of the plaintiff, the court further

charged the jury, that a tender, to be legal, must be made in gold or silver, the legal currency of the country. The defendant excepted to this, and requested the court to charge, that a tender, in current bank bills, was a legal tender, if not objected to, on that account. This was refused; and the jnry instructed, that a tender, on the day, at the plaintiff's place of business, or to his clerk, during his absence, to be legal, must be in gold or silver, and the production of such current bank biils, at such place of business, in plaintiff's absence, would not be sufficient. To this also, the defendant excepted; and now assigns the several matters as error.

Seawell, for the plaintiff in error, made the following points:

1. A tender in current bank bills is a legal tender, if not objected to on that account. [Miller v. Race, 1 Burr. 457; Wright v. Read, 3 Term R. 554; Brown v. Saul, 4 Esp. 267; Holland v. Phillips, 6 ib. 46; Snow v. Perry, 9 Pick. 542; Bell v. Stanly, 5 Yerg. 199; Croley v. Weeks, 10 ib. 142; Bank U. S. v. Bank of Georgia, 10 Wheat. 333; Hoyt v. Byrnes; 2 Fairf. 478; Alexander v. Brown, 1 C. & P. 288; Polglaze v. Oliver, 2 Tyr. 92; Williams v. Roser, 7 Mass. 556.]

2. A tender, to an authorised agent, is a tender to the principal. [Woodland v. Blewett, 1 Camp. 477; Anon. 1 Esp. 348; Moffat v. Parsons, 5 Taunt. 307; Wilnub v. Smith, 3 C. & P. 453; Jackson v. Crafts, 18 Johns. 114; Paley on Agency, 219.]

3. The tender of the money re-invested the title, without any conveyance. [Deshazo v. Lewis, 5 S. & P. 91; Hammond v. Hicks, 1 Porter, 421; Sims v. Canfield, 2 Ala. Rep. N. S. 555; 2 Coke's Litt. 343, n. 2; 38, 207, 209; Bacon's Ab. Tender, F, 13; Coote on Mortgages, 13 to18; Kemble v. Wallis, 10 Wend. 374; Hepburn v. Auld, 1 Cranch, 321; Jackson v. Crafts, 18 Johns. 110; Bell v. Stanly, 5 Yerg. 199; Corley v. Weeks, 10 ib. 142: Edwards v. Farmer's Ins. Co. 21 Wend. 467.]

Campbell, *contra*, insisted that there was nothing like a mortgage here; there was no debt between the parties, and therefore, there could be no security for one. The charge of the court, that there was a mortgage, was a clear mistake;

and the subsequent proceedings, if erroneous, ought not to affect the plaintiff, as the defendant cannot succeed on the title shewn.

The agreement by Henry was a mere contract to sell, and its breach did not confer a right of property.

The tender made was of bank bills on a bank in a state of suspension, which is not good. [Chitty on Con. 307.]

GOLDTHWAITE, J.—1. We think it very clear that the Circuit Court mistook the law, with respect to the effect of the tender of bank paper in this case. The rule is, when bank notes are offered in payment, and no objection is made *on that account*, the offer is a good tender. [Wright v. Reed, 3 Term Rep. 554;] and the reason is, because bank notes generally pass as cash. [Miller v. Race, 1 Burr. 452.] It is said, however, that here the notes offered were those of a bank which had suspended specie payments, and therefore, the reason fails. This fact does not appear in the case, but if it did, we apprehend it would not change the rule, for an additional reason: to hold such a tender good, grows out of the circumstance, that when no objection is made, the party making the tender is lulled into security, when if objection was made, he could, in most cases, readily obviate it, by procuring specie.

2. It is objected, that the judgment ought not to be reversed, for this error, because the court mistook the turning point of the case, which was, that there was in fact no mortgage here; there being no debt, there could be no security. It is a sufficient answer to this, to say, that we cannot know precisely how the fact was in the court below; the defendant tenders his bill of exceptions, and as the court ruled it to be a mortgage transaction, it was not necessary for him to show the proof which made it such. The court held it to be a mortgage, and the proof probably made it such; we cannot therefore look to the case, on the facts stated, and presume nothing more was before the jury, because the party excepting is not bound to state his whole case, but only so much as shows the error complained of. We may remark, however, that on the facts stated, we might feel inclined to consider the sale as a mortgage security; how it would be, if a distinct agreement was shown that it was

an absolute sale, and that, in case of the death of the slave, no debt survived, is a question not presented, and need not be determined now.

We feel constrained to consider the case as it was considered in the court below, for the purpose of sending it back, that the parties may have an opportunity to present the case distinctly, on what is said to be the principal question.

Judgment reversed, and cause remanded.

SHELTON, ET AL. v. DOE, EX DEM. ESLAVA.

1. A tenant, when sued for the possession of demised premises, by the landlord, is precluded, as well during its continuance, as after its termination, from calling in question the title of his landlord, or setting up an outstanding title in a stranger.
2. The only effect of a disclaimer of the title of the landlord, by the tenant, is, to bar the entry of the landlord, if after knowledge of such disclaimer he permits the tenant to remain in possession until the statute of limitations forbids an entry.

ERROR to the Circuit Court of Mobile.

Ejectment by the defendant against the plaintiff in error.—Upon the trial, the plaintiff below offered in evidence, that the land sued for was parcel of a tract of land known as the De Lusser claim; that the father of the lessors of the plaintiff, in 1820, or 1824, caused it to be surveyed into lots, and that it was divided between the heirs of De Lusser, and the father of the lessors of the plaintiff. It was further in evidence, that the land in the declaration mentioned, was allotted to one of the lessors of the plaintiff, and was claimed in fee.

The plaintiff also offered in evidence a deed, executed the 1st February, 1828, by which the premises sued for was leased by him to the defendant, for the term of six years, at the yearly rent of one hundred dollars. "And also, that said party of the second part, his heirs and assigns, shall and will, at his

and their own proper costs and charges, surround and enclose the said lots with good and substantial fences, and cultivate and improve the same, and pay and perform all taxes, &c. That he the said party of the second part, and his heirs, shall not assign or transfer, or let over the said lots, or any of them, or any part thereof, to any person or persons, without the consent of the said party of the first part, in writing first had and obtained therefor—that the said party of the second part, his heirs, &c., shall and will peaceably and quietly yield, surrender, and give up to the said party of the first part, his heirs, &c., the premises aforesaid, at the end of the said six years, or sooner, determination of said lease, together with all and singular the improvements thereon, or which may be made thereon: Provided always, and the said party of the second part, is hereby authorized and empowered, at any time within three years from the date hereof, at his own proper costs and charges, to erect and build a good dwelling-house, on one of the said lots; and the said party of the first part, hereby agrees at the expiration or sooner determination of the said term, to pay to the said party of the second part, for the improvement of such good dwelling house, if erected and standing on the premises, its fair value, to be appraised by three disinterested persons, one to be appointed by each one of the said parties, and the third to act as umpire between the other two, to be appointed by them." The remaining covenant is, that if the party of the second part violated any of the covenants entered into by him, the party of the first part might enter and expel him from the premises.

The plaintiff also offered evidence to prove, and the defendant admitted that he claimed to hold the premises adversely, but the plaintiff failed to prove by positive testimony, that the defendant had claimed to hold adversely during the term of said lease. The plaintiff offered no evidence of legal title.

The defendant offered in evidence, and relied on a patent from the United States, embracing the premises in question, to one Joshua Kennedy, usually called the "*Price Grant.*"

The defendant's counsel then moved for the following charges: 1. That although it was a well established rule of law

that a tenant cannot call in question the title of his landlord, that such restriction only continues during the term of the demise. and that if during the term the tenant neither disclaims or breaks any of the covenants, after its expiration, he has a right to show that the landlord, at such time, has no right to the premises by the legal title.

2. That from the terms in which the lease, in this case, is expressed, the agreement to pay for the improvements thereon, became a condition precedent, and that the plaintiff could not recover possession of the premises until he had paid the defendant for such improvements as had been proved to have been made in conformity with the terms of the lease.

Whereupon, the court charged, that a tenant, when sued for the possession of demised premises, was precluded, as well at any time after the lease had expired, as during its existence, from calling in question the title of his landlord, or improving an outstanding title from a stranger: and also, that the agreement to pay for improvements is an independant covenant, on which the defendant may seek his remedy at law, but does not prevent his recovering possession of the premises, although he may be liable to the defendant for the value of such improvements.

To all which the defendant excepted, and which he now assigns for error.

Gibbons, for plaintiff in error.

Campbell, *contra.*—It was not necessory that the plaintiff should have shewn that the disclaimer of the defendant was, during the continuance of the term, to give him the benefit of the rule, that the tenant cannot dispute the title of his landlord. [5 Wend. 246; 1 Cowen, 575; 3 Peters, 44; 5 id. 485; 30 Eng. C. L. 67; 4 M. & S. 347; 2 A. & E. 17.]

As to the covenant to pay for improvements, there was no proof that any were made; but in addition, if any such were made, they were forfeited by a disclaimer. Upon this point, the lease itself is express, as well as the general law. [3 Peters, 44; 4 Wend. 633.]

But the agreement to pay for improvements is not in the nature of a condition, but forms an independant covenant. The lease is for six years—the rent is nominal—the covenants to improve pay taxes, and yield possession, are all secured to the lessor, by a general and controlling clause, allowing a re-entry, and providing for the expulsion of the tenant. [8 Cowen, 266, 295; 14 Wend. 219; 4 H. & J. 285; 6 Leigh, 154; 6 Cowen, 302.]

ORMOND, J.—The charge moved for, assumes, that if the tenant does not disclaim the title of the landlord, during the tenantcy, he is not precluded from setting up an outstanding title after its expiration.

The rule, that the tenant cannot dispute the title of his landlord, continues as well after the tenantcy is at an end, as during its continuance. He cannot change the character of the tenantcy, by his own acts, so as to enable him to hold against his landlord, who reposes under the security of the tenantcy, unless after disclaimer of the title of the landlord, he, with knowledge thereof, permits the tenant to remain in possession such a length of time that the statute of limitations bars an entry. [Tillotson v. Kennedy. 5 Ala. and cases cited on the brief of defendant in error.] There is no foundation whatever for the supposition, that if the tenant does not dispute the landlord's title during the continuance of the lease, he may set up an outstanding title in a stranger, after its termination. If such were the law, a demise would be a most hazardous thing, as it would be in the power of the tenant, at the termination of the lease, by setting up an outstanding paramount title in a stranger, to deprive the landlord of the benefit of his possession. Whatever, however, might be the injurious consequences to the landlord, from the admission of such a principle, it is perfectly clear no such rule of law exists.

We do not consider it necessary to enter upon the enquiry, whether the construction, put by the court, on the covenant, that the landlord was to pay for the erection of the house, which the tenant was at liberty to build, was correct or not, as it does

not appear from the record that the house was built. The charge, therefore, so far as we can judge from the record, was purely abstract; and whether right or wrong, could not prejudice the plaintiff in error.

Let the judgment be affirmed.

ALLEN v. BEST.

1. Land was levied on under an execution issued by a justice of the peace, and an order made by the Circuit court directing its sale; the costs, up to the time the papers were returned to court, were $3 81-100, and the entire costs are stated in the *venditioni exponas*, at $13 81-100. The order of court is, that the sheriff "be commanded to sell, &c.," and the terms of the *venditioni exponas* are, that he is "commanded to cause to be made of the lands, &c.:" Held, 1. That the inference is, that the costs were increased by the action of the Circuit court. 2. That the legal effect of the terms employed in the *order* and *venditioni exponas* is identical; consequently, there was no variance between them.
2. *Quere?* will a purchaser at a sheriff's sale be affected by a variance between the *venditioni exponas*, and the order under which it issued, if the writ is not void.

WRIT of error to the Circuit Court of Barbour.

This was an action of trespass under the statute, at the suit of the plaintiff in error against the defendant, to try the title to a tract of land situate in the county of Barbour; as also to recover damages for its occupancy. The cause was tried on the plea of "not guilty," a verdict returned for the defendant, and judgment thereon rendered.

From a bill of exceptions sealed at the trial, it appears that the land in question had been levied on by a constable in virtue of an execution issued by a justice of the peace, and the papers and proceedings in the case before the justice, returned to the circuit court. The order of that court, after describing the land, affirming the regularity of the proceedings, &c., proceeds as follows: "therefore, on motion of the plaintiff, by attorney, it is ordered by the court, that the sheriff be commanded to sell said land in satis-

faction of said plaintiff's demand, and the costs, &c." In the order, the execution issued by the justice, is described as being for "Forty-eight 42-100 dollars, with interest thereon from the 19th day of May, 1841, $3 81—costs below." The *venditioni exponas* issued upon this order, after describing the land, &c., proceeds thus, "you cause to be made the sum of forty-eight 42-100 dollars, with interest thereon from the 19th day of May, A. D. 1841, which," &c.; "as also, the further sum of thirteen 81-100 dollars in and about the said suit in that behalf expended," &c. The defendant's counsel objected to the *venditioni exponas*, on the ground that it did not conform to the order of sale. The objection was sustained, and the writ excluded from the jury.

Wm. Cochran, for the plaintiff in error.
No counsel appeared for the defendant.

COLLIER, C. J.—We are at loss to perceive any material variance between the order of court directing a sale of the land, and the mandate by which it was carried into effect. In describing the execution which had been levied by the constable, the costs of the proceedings, up to the time they reached the circuit court, are stated in the order to have been three 81-100 dollars, while in the *venditioni exponas*, the *entire* costs are put down at thirteen 81-100 dollars. The fair inference is, that the costs were swelled to this latter sum by the action of the circuit court; the more especially as its mandate does not require or authorize any more to be collected than is thus expressed upon its face.

It is said by the plaintiff's counsel, that the only discrepancy pointed out is, that the court orders that the sheriff "be commanded to sell" the land, &c., while by the *venditioni exponas*, he is "commanded to cause to be made of the lands," &c. The legal effect of these terms is identical. When an executive officer is commanded by process to cause money to be made of property, he is authorized to sell it, for this is the only mode by which he can make it available in the collection thereof. This objection, then, is equally untenable as the first.

But suppose there was a discrepancy which did not go the extent of making the *venditioni exponas* utterly void, would a *bona fide* purchaser at the sheriff's sale be thereby affected? [Boren

et al v. McGehee, 6 Porter's Rep. 444; Wyman et al. v. Campbell et al. id. 219.] We merely state this question; the view taken does not require that it should be answered.

The judgment of the circuit court is reversed. and the cause remanded.

McLEOD, ET AL. v. McDONNEL AND WIFE.

1. A testator made his will in these terms: "That all my property, both real and personal. of which I am now possessed, or may hereafter accrue, be retained and continued together, till my youngest child may have arrived at lawful age; at which time all the above property, with its increase, from now on to the time of my youngest child arriving at lawful age, to be equally divided among all my lawful heirs." His property consisted of lands, slaves, stock, plantation utensils, &c. He died leaving a widow and five infant children. *Held*, that the intention to be gathered from these expressions, in connexion with the circumstances, is, that the family relation between the wife, children, and slaves, shall be continued, and that the plantation be carried on for the benefit of the family. The wife, under this will, takes a vested interest in one-sixth part of the estate, to be divided at a future period.
2. The provision for the wife is inconsistent with dower and distribution of the same estate, consequently, without any express legislation upon the subject, she would, in equity, be put to her election.
3. The only change of law, made by our statute, which requires a widow to signify her dissent from the provision made for her by her husband's will, is to introduce a determinate period, within which she must signify her dissent, or else the provision, if in equity, a bar of dower, becomes absolutely a bar at law.
4. When application is made for an allotment of dower, and distribution of the personal estate, to the County court, which has possession of the will by probate, and the will is inconsistent with such claim, there is a defect of jurisdiction in the court to act upon the petition, unless the fact of dissent from the will, is shown affirmatively.

WRIT of error to decree of the judge of the country court of Wilcox county on a petition for dower.

The case made in the petition is this: Angus McIntosh, in his

lifetime, intermarried with the petitioner, Janet, (who, after his death, intermarried with the petitioner, McDonnel;) and, during the coverture, and at the time of his death, was seized in fee of certain lands described in the petition; also, of certain slaves and other personal chattels McIntosh died in 1838, leaving four children surviving, all of whom are minors. Previous to his death, he made and published a will, in which he made no express provision for his wife. This will was admitted to probate, and Alexander McLeod and the petitioner, Janet, were appointed as administrators with the will annexed. She intermarried with McDonnel in 1843, and he thereby, in right of his wife, became a co-administrator with McLeod.

The prayer is, that dower of one-third part of the lands may be allotted, and a distribution of one-fifth of the personal estate.

This petition was filed in July, 1843, and citations were ordered to be served on the co-administrator, McLeod, as well as the infants. After service, a guardian *ad litem* was appointed for the minors; and the defendants demurred to the petition, which, being overruled, they pleaded as follows:

1. The minors, by their guardian, objected, that the prayer of the petition ought not to be granted, because the said Janet did not, within four years after the probate of the will of McIntosh, dissent therefrom; and because the said Janet is therein provided for according to the act of assembly, and has acquiesced in the provisions thereof for more than five years.

Upon this, issue was taken.

2. The administrator objected, that by the provisions of the will of McIntosh, his estate was to be kept together until his youngest child should be of age, which period has not elapsed; and that the said Janet acquiesced in the will for more than four years; also, that the estate has not yet been settled, there being outstanding debts unpaid.

The petitioners demurred to this plea; but the demurrer being overruled, they then replied:

That there was money, choses in action, and other personal effects more than sufficient to pay and satisfy the outstanding debts beyond the property described in the petition.

The defendant demurred to this replication; but, it being overruled, issue was taken.

No jury trial was demanded, and the issues were all determin-

ed by the court in favor of the petitioners, and a decree rendered for the appointment of commissioners to set apart and allot dower of one-third part of the lands; and to distribute one-fifth part of the personal estate.

In the course of the investigation, but not until after the petitioners had closed their case, the will was offered to be read by them. The defendants objected to the reading of it then, and excepted to the decision of the court overruling their objection. The will is in these terms:

I, Angus McIntosh, do constitute and make this my last will and testament, as follows: That in the first place, all my lawful and just debts be paid. 2nd. That all my property, both real and personal, of which I am now possessed, or may hereafter accrue, be retained and continued together till my youngest child may have arrived at lawful age; at which time, all the above property, with its increase from now on to the time of my youngest child's arriving at lawful age, to be equally divided among all my lawful heirs. In witness, &c., executed on the 1st January, 1838, in the presence of three witnesses, and admitted to probate 29th same month.

The several matters determined by the judge of the county court, are now assigned as error.

Bethea, for the plaintiffs in error.
Sellars, *contra.*

GOLDTHWAITE, J.—Before entering upon the consideration of our statutes which define the right of the widow to dower in the real, and distribution of the personal estate, and compels her to elect between the will and legal provision, it is proper to consider whether the will before us makes any provision for the widow; and if it does, whether it was intended or has the effect to bar her claim to dower and distribution, or to put her upon an election.

1. In the construction of a will, the great object to be ascertained is the intention of the testator; and, when discovered, that will always prevail, if not inconsistent with the rules of law. The clause of the will of which the intention is to be ascertained, is this: "That all my property, both real and personal, of which I am now possessed, or may hereafter accrue, be re-

tained and continued together till my youngest child may have arrived at lawful age; at which time, all the above property, with its increase from now on to the time of my youngest child arriving at lawful age, to be equally divided among all my lawful heirs." To ascertain the general intention of a testator, when his will is not clearly expressed, we apprehend it is perfectly legitimate to look at the condition of his family, the nature and description of his property, and even the state of society where he has had his residence. Here, there is no express provision made for the support of his wife or children; but we are not to infer from its absence that no such provision was intended. He directs his property to be *retained* and *continued together*. This property, besides real estate, consists of slaves, stock and plantation utensils; so that the selling, or even hiring out seems to be inhibited. He does not provide that the property shall accumulate, but directs that all of it, with its increase, a term perfectly familiar to all, shall be divided at a future day. His children, five in all, are minors, in 1843; so the presumption is, that in 1838, when the will was made, some, and, perhaps, the most of them, must have been of a tender age. With these expressions, connected with these circumstances, his general intention cannot be misunderstood. It was, that the family relation should be continued between his wife, children and slaves, and that his plantation should be carried on for the benefit of his family. In no other manner can the expressed direction to *retain and continue the property together*, be carried out, unless we suppose the absurdity of keeping slaves and stock, without using them.

The intention is clearly expressed, that his real and personal estates shall go to the same persons; and, when reference is had to the general intention of the testator, it leaves no reasonable doubt that his wife was intended to be included in the general term *lawful heirs*. It is possible that, if this was a devise of real estate only, the proper construction of this term, uncontrolled by the obvious intention that there should be no division of the estate, would be to confine it to the heirs at law; but when it is used with reference to the personalty, it means next of kin, unless this meaning is controlled by the context; because the next of kin are the only persons appointed by the law to succeed to personal property. [Holloway v. Holloway, 4 Vesey, 649; Lowndes v. Stone, 5 Vesey, 403; Vaux v. Henderson, 1 J. &

W. 386.] Here, the testator uses the term, lawful heirs, in the same sentence where he fixes the period for distribution; and apparently endeavors to give point to it by prefixing *all*, as if to indicate that *all my children* would not convey his meaning. Independent of the strong presumption arising from the use of the words *lawful heirs*, instead of children, another springs out of the entire omission of a provision for his wife, or any reference to her legal claims; because it is utterly inconsistent with common experience that the testator could have supposed that *all* his estate, real as well as personal, could be kept together unless a satisfactory provision was made for his wife by his will. The expressed intention, that all the property shall be retained and continued together, coupled with the use of a term which includes all the distributees, is conclusive that his intention was to provide for his wife in the same manner and to the same extent as each of his children.

The only doubt we have had of the correctness of this construction, was, that on the first reading of the will, it seems to convey the idea that the estates of those entitled to the personal property was not to vest until the youngest child became of age; in which event, the children and widow would have no present interest in it, but the estate would vest in and be divisible between such persons as should then answer the description of lawful heirs. Independently of the fact, that such a construction is directly counter to what we have ascertained is the general intention of the will, it would defeat the particular and expressed intention that the personal and real estates should go to the same persons. It is said, a bequest of personal estate to a person when he becomes of age, or to several, to be divided among them at a particular period, does not vest until the period arrives; and that there is a difference in this respect in the construction of bequests and devises, growing out of the circumstance that courts ef equity take their rules of construction from the civil law. [Machen v. Reynold, 14 East, 601; Hanson v. Graham, 6 Vesey, 239; Stapleton v. Cheales, Pre. Chan. 317.] But a devise in the same terms vests an immediate interest. [Goodtitle v. Whitley, 1 Burr. 228.] The rule of the civil law, with respect to bequests, only applies, however, when there is nothing in the context of the will to explain the intention; and, therefore, a direction to apply the interest of the fund bequeathed, has been held a sufficient in-

dication of the intention to vest the legacy immediately. [Fonereau v. Fonereau, 3 Atk. 645; see other cases to the same effect, 1 Roper on Leg. 388.]

From what has been said, it will be apparent that our conclusion is, that under the will the widow took an absolute vested interest in one-sixth part of the testator's real and personal estates, to be divided at a future period. No question is raised as to the extent of her present interest in the income derived from the labor of the slaves on the plantation; and, therefore, no opinion is given on that subject.

2. We are next to inquire, if this provision in the will is inconsistent with the legal right to dower and contribution, and was intended in lieu thereof. The rule in equity, which governed previous to any legislation on this subject, is, that to put the widow to the alternative of either waiving her interest under the will, or foregoing her right to dower in the lands of her husband, it must be clearly evinced that her taking both interests will defeat the general intent of the devisor. [Powell on Dev. 466.] Roper says, the rule, as settled by modern decisions, requires that, in order to deprive a widow of dower, it must be shown that the testator *intended to exclude her from it;* as, for instance, where there is an inconsistency between her claim of dower and the disposition of the estate by the will. [2 Roper on Leg. 414.] In Foster v. Cook, [3 Bro. C. 347,] Lord Thurlow held, that the widow ought not to be put to her election, but by express language, or an inference which was irresistible. What circumstances will authorize such an inference, is exemplified by many cases. Thus, in Villa Real v. Lord Galway, [1 Bro. C. 292,] there was a devise of an annuity to the widow for life. *All* the testator's estates were subjected to this annuity, and devised to trustees in trust to permit his daughter to receive *all* the rents. Lord Camden held the widow to an election, inasmuch as the allowance of dower would be inconsistent with the devise. So, in Chalmers v. Stovil, [2 V. & B. 222,] a devise of lands, in which the widow was entitled to dower, *to her and two others,* to be *equally divided* between them, was considered a case for election. Other cases of similar import might be cited, but these are satisfactory to show that the bequest and devise here of property, in which the widow was entitled to contribution and dower, to her and others, to be *all equally divided* between them,

makes her claim under the law inconsistent with the will, and raises an irresistible inference that it was not the testator's intention that she should have both. We have chosen rather to determine this point of the case upon equity principles, than to have reference to our statute; though under one very similar, in Virgina, it has been held, that the intention of the testator that the devise should operate as a bar of dower, might be shown by an averment *dehors* the will. [Ambler and Wife v. Nelson, 4 H. & M. 23.] But in this respect only, it is said, does the Virginia act vary the common law. [Herbert v. Wren, 7 Cranch, 370.] We have also forborne a consideration of an earlier statute, which declares "that the widow may, in all cases, waive the provisions made for her in the will of her deceased husband, and claim her dower, which shall be assigned her accordingly: in which case, she shall receive no part of such provision, unless it appears plainly by the will that the testator intended it in addition to her dower." [Clay's Digest, 172, § 1.] Whether this was intended to introduce a rule of construction different from that which previously obtained in equity, or was intended to relieve the widow from the consequences of an erroneous conception of her rights under the will, need not now be considered.

3. The question next in order is, whether, as a provision is made by this will for the widow, and intended in lieu of dower and contribution under the statute, she is compelled to abide by it, inasmuch as she has never signified her dissent from it either in the county or superior court of her residence. The words of the act, so far as they relate to this subject, are these: "When any person shall die intestate, or shall make his last will and testament, and not make therein any express provision for his wife by giving and devising to her such part or parcel of his real and personal estate as shall be fully satisfactory to her, such widow may signify her dissent thereto in the superior or county court, in the county where she resides, at any time within one year after the probate of such will; and then and in that case she shall be entitled," &c.—going on to declare she shall be endowed of one-third part of the real estate of which her husband was seized during coverture, for the term of her life; and one-half of his personal estate absolutely, after paying his debts, if there be but one child; a child's part, if there be less than four children; and one-fifth, if there be more. [Clay's Digest, 172, § 3.] Our impres-

sion at first was, that the term, *express provision*, was to be understood as directing an election only in case of a provision *expressing* to be in lieu of dower; but further consideration has satisfied us that the evil intended to be obviated was the difficulty which previously existed of ascertaining when and how an election was to be made by her. According to the course of equity law, the widow was entitled to an account before she was compelled to elect; and a suit in equity was frequently necessary to compel the election. This seems to be the only change made by the statute in the existing law—a fixed and definite term was introduced within which she is compelled to signify her dissent to the will; and if this is not made, it then, if any provision is made inconsistent with her right under the statute, becomes obligatory upon her. Such is the construction which similar enactments have received in Virginia and Kentucky. [Blunt v. Gee, 5 Call. 481; Shaw's Devisees v. Shaw's Heirs, 2 Dana, 341. See, also, Ex. of Green v. Green, 7 Porter, 19.]

4. The application of what has been said to the case before us, will show that the county court should have declined jurisdiction. The will of McIntosh was admitted to probate in that court in January, 1838, and letters testamentary granted upon it. It was thus, as a court of probate, in possession of the will, and no allotment of dower or distribution could be made as in case of intestacy, or if, as there was no provision for the widow, because such a course would be inconsistent with the will; and the jurisdiction could only be revived by causing it to appear that the widow had signified her dissent from its provisions within the year, in the manner provided by the act. The defect of jurisdiction appearing from the records of the court, the question was necessarily involved in the demurrer to the petition, which, in our opinion, ought to have been sustained upon this ground. The demurrer to the plea, by the administrator, that the estate had not been settled, would bring that point of the case within some expressions used by us in the case of Ex. of Green v. Green, [7 Porter, 19;] but, as the point was not raised in that case, and is not there decided, we choose to confine our present decision to the demurrer to the petition; and this the rather because the influence of the statute which authorizes distribution of an estate after eighteen months, [Clay's Digest, —.] was not then considered.

The result of our opinion is, that the judgment of the county court must be reversed.

FINDLEY v. THE STATE BANK.

1. The Bank is not affected by a conditional execution of a note by a surety, of which it has no knowledge.
2. When a note is offered to a Bank for discount, and refused, unless an additional surety is given, which is not done, and afterwards, the note is put in suit by the Bank—*Held*, that the Bank, to show title in the note, must prove that it was afterwards discounted, and the money received by the principal, or carried to his credit, in the extinction of an old debt. Leaving the note with the officers of the Bank, is a repetition of the offer to discount.
3. Proof that the old debt was extinguished, would be evidence *prima facie* of the acceptance and discount of the note by the Bank.

Error to the County Court of Tuskaloosa.

This was a motion by the Bank against the plaintiff in error, on a note negotiable and payable at the Bank by Ransom Covey, as principal, and the plaintiff in error and one James Rogers as his sureties.

An issue being made up between the parties, and submitted to a jury, the defendant proved that he was a mere surety to the note, and that he signed it upon the condition that one Nicholas Perkins, or some other solvent person, should sign it as co-surety, and that it was not otherwise to be used. That Covey, the principal, procured Rogers to sign it as surety, who was insolvent.—That on its being presented to the bank, one of the directors advised the board, that Rogers was insolvent; that thereupon the note was discounted by the board upon the condition that another good name should be obtained, and that no other name was obtained on said note. Upon the note which was produced, was the following memorandum, "taken March 12, 1840—cond't another name." It did not appear that the Bank had any knowledge

of the condition upon which the note was signed by the defendant.

Upon this evidence, the counsel for defendant moved the court to charge that the facts above stated, if believed by the jury, did not prove that any title to the note vested in the bank, so as to authorize a recovery in this case, which charge the court refused, and to which the defendant excepted, and now assigns for error.

PECK and CLARKE, for plaintiff in error.
B. F. PORTER, *contra.*

ORMOND, J.—The Bank being ignorant of the condition on which the note was executed by the surety, is not affected by it, but we think there is no sufficient evidence in the record, that it has title in the note. The fact of possession, is, in general, sufficient evidence of ownership *prima facie*, but here, it is shown that the Bank refused to discount the note, unless another surety was obtained to it, which was not done. Doubtless the directory may afterwards have altered their determination, and have discounted the note in its then condition, but there is no proof that this was done, and it would be going rather too far to infer this from the mere fact of putting it in suit.

It was urged in argument, that the surety was not liable, unless the principal received the money on the note. This position cannot be sustained. The execution of the note by the surety, was *prima facie* an authority to the principal to use it, either in the extinguishment of an old debt due the Bank, or for the purpose of obtaining money from the Bank. Nor was it necessary after the rejection of the note by the Bank in the first instance, that it should be again presented by the principal for discount.—The leaving of the note with the officers of the Bank after its first rejection was a repetition of the proposition, and authorized the Bank at any subsequent time, to accept the note in its then condition, and if the principal was indebted to the Bank, to carry the amount to his credit, in extinction of the old indebtedness, and proof that the old debt was thus extinguished, would be evidence *prima facie*, of the acceptance of the note by the Bank.

Let the judgement be reversed, and the cause remanded.

ROBERTSON v. LOCKE, ET AL.

1. Where a motion for judgment was made against the sheriff and his sureties, upon a suggestion, that with due diligence, the former might have made the amount of an execution, it appeared that the sheriff had collected the greater part of the execution before its return day, and the residue afterwards: *Held*, that as to the money collected, before the execution was returnable, the sheriff was not chargeable with neglect, and the plaintiff was not entitled to judgment against him and his sureties, in a summary proceeding under the statute.

WRIT of error to the Circuit Court of Greene.

This was a proceeding against Locke, late sheriff of Greene, and the other defendants, as his securities, suggesting that the former, with due diligence, could have collected the amount of a *fieri facias*, which had been placed in his hands as sheriff, to execute and return. The defendants pleaded, 1. Not guilty. 2. That the sum of nineteen hundred and sixty dollars and ninety-four cents, was made on the execution by Locke, after the same came to his hands, and before the return day thereof. 3. That another sum, to wit, fifteen hundred and twenty-two dollars and twenty-three cents, was made on the execution by Locke, previous to its return day.

The cause was submitted to the court for its decision, upon issues taken to the defendant's pleas. In the judgment entry it is affirmed, that it appeared to the court that Locke made on the execution before the day of its return, the sum of $1,522 23, and on the day after the return, the further sum of four hundred and twenty dollars; a few days thereafter, the further sum of $18 71. All of which several sums are equal in amount to the money required to be made on the execution. It was also ascertained by the court, that the money might have been made *in toto* by the sheriff, by the employment of due diligence, previous to the return of the execution. Thereupon, a judgment was rendered in favor of the plaintiff for the money collected subsequent to the return of the *fi. fa.* with ten per cent. damages thereon, according to the statute, with costs.

MURPHY, for the plaintiff in error, contended, that as the sheriff could have made the money previous to the return of the execution, and had not levied, the plaintiff could not be required to receive less than the entire amount to which he was entitled. That the plaintiff had declined to receive the part collected, and was entitled to a judgment for all, with damages. He cited Watson's Sheriff, 7 Law Lib. 143, 147; Minor's Rep. 48.

J. B. CLARK, for the defendant, insisted, that the plaintiff's suggestion was not made out as to the money collected, before the *fi. fa.* was returned, and the circuit court properly refused to render judgment for that sum and damages. He referred to the case of Willard, Freeman & Co. v. Womack, [4 Ala. Rep. 539.]

COLLIER, C. J.—The statute under which this proceeding was instituted, is in these words, "Whenever any sheriff or coroner, to whom an execution shall have been delivered, shall fail to make the money on or before the first day of the term of the court to which said execution shall be returnable, the plaintiff or plaintiffs, his, her or their attorney, shall suggest to the court, that the money could have been made by said sheriff or coroner, with due diligence, it shall be the duty of the court forthwith to cause an issue to be made up, to try the fact; and if it shall be found by the jury that the money could have been made by the sheriff or coroner, with due diligence, judgment shall be rendered against said sheriff or coroner, and his securities, or any or either of them, for the sum of money specified in said execution, together with ten per centum on the amount, &c." [Clay's Dig. 218, § 85.]

This act, it will be observed, affords a summary remedy, and inflicts a penalty for a neglect of duty, and according to the repeated adjudications of this court, cannot be extended by construction beyond what its terms fairly import. The inquiry which it directs to be made upon the suggestion, is whether the money could have been made "with due diligence," and to entitle the plaintiff to a judgment, this fact must be found affirmatively by the verdict where the defendant makes default, or concluded, by the issue where he appears and pleads. [Adams, et al. v. White, 2 Ala. Rep. 37.]

In Hallett v. Lee, et al. [3 Ala. Rep. 28,] it was decided, that it was not only competent for the sheriff to traverse the allegation

of the suggestion, but he might interpose by way of plea, any matter of avoidance which constitutes a legal defence. The defendants pleas in the present case, allege facts which negative the idea of negligence, such as the statute contemplates. The failure to make the money, a fact of which the want of diligence is predicated, is denied by the second and third pleas; by the second, it is averred that the entire amount of the execution has been collected; and by the third, that the greater part of it has been made. The third plea appears to have been fully sustained by the proof, and on this as well as the other, issue was joined, and by consent, submitted to the court instead of the jury. The court affirms, that it was sustained by the proof, and to the extent of the money made upon the execution, refuses to render a judgment in favor of the plaintiff. In all this we can discover no error; for it is clear, if the sheriff made the money, he is not chargeable with a want of due diligence for not having collected it.

The judgment in this case will not preclude the plaintiff from proceeding summarily against the defendants for the money in the sheriff's hands—it, in fact, furnishes evidence sufficient to sustain a recovery upon such a motion.

Whether the plaintiff in execution may maintain an action against the sheriff at common law, and recover the full amount of it, when the sheriff is willing to pay what he has collected, where he has been guilty of negligence in not making the residue, is a question not necessary to be considered. The proceeding in the case before us, is regulated by a statute, which must be strictly pursued.

The judgment of the circuit court is affirmed.

PRICE, ET AL. V. CLOUD.

1. The omission, in a notice to a sheriff, of a rule for failing to pay over monies collected on an execution, to state a *day certain* upon which the money was demanded from him, is not an error which can be reached by demurrer. It is suf-

ficient if the notice shows the demand was made after the collection, and before the notice.

2. Pleas to a motion against a sheriff and his sureties, for failing to pay over money collected on an execution, are bad, when they assume a return of satisfaction, and assert that the return is a mistake.

3. Any plea *by a surety*, in such a case, is bad, which attempts to deny the liability of the principal on behalf and in the name of the surety. When the sheriff is a party, the defence, with respect to his liability, must be carried on in his name.

4. When a bond is alleged to have been delivered as an *escrow*, and the evidence has no tendency to show that the condition of the delivery was communicated or known to the person to whom the delivery is made, the evidence may be rejected.

5. When there is a return of satisfaction to an execution, it is not competent for sureties of the sheriff to show, as a defence, that no money was paid to the sheriff, but that the satisfaction was entered on account of property received, until the return is set aside. Whether it would be set aside, on a proper showing, *Quere*.

6. The return of satisfaction upon an execution, without any date or evidence in connexion with it, refers to the return day of the execution.

7. When there is a return of satisfaction, by the sheriff, it is unnecessary, in a motion against sureties, who became so previous to the return day, to shew any thing more than the return, and a demand of the money.

WRIT of error to the County Court of Benton county.

Motion by Cloud, for judgment against Price, as sheriff of Benton county, and the other defendants, as sureties upon his official bond. The notice of the motion alleges, that a *fi. fa.* issued from the county court of said county, on the 26th July, 1841, in favor of Cloud, against Erasmus R. Burt and George Morgan, for $121 87, and $13 31 costs, returnable to the then next term of said court. That on the same day it was placed in Price's hands as sheriff, to be levied and returned; and that he, after the reception of the said *fi. fa.* and before the return day, being said sheriff, and by virtue of the said *fi. fa.* collected the money and costs due upon said execution. Which said monies the said Price is charged with having failed to pay over, on demand, to the plaintiff.

The notice then proceeds to inform Price, that on the 4th day of the July term of the county court, the plaintiff would move for judgment against him, and his securities in office for the amount of money so collected by him, together with five per cent. per month from the time of making such demand. The notice is addressed to Price only, but in the caption, the case is stated as

against him, and Thomas N. Williams and Isaac Haynes, securities.

It seems, from the pleadings, that the securities, Williams and Haynes, appeared and contested the motion, as well as the sheriff.

Price pleaded, 1. That his return to the execution was a mistake, and that in fact, no money was made upon it. 2. The sureties pleaded the same matter in their own behalf. 3. The sureties pleaded that no money was collected on the execution. Demurrers were interposed to their pleas, and sustained by the court. 4. Price, for himself, pleaded that he did not fail to pay over any money collected, as charged by the plaintiff in his suggestion; and upon this there was issue. 5. The sureties for themselves, pleaded, after craving oyer of the bond, that judgment ought not to be rendered against them, because the said bond was delivered as an *escrow*, and to take effect only upon condition that the names of John Lawson, James Crow and William Dothard, should be procured and signed as co-obligors. 6. A similar plea to the last, concluding that, therefore, the bond is not their deed. Upon these, after demurrer overruled, the plaintiff took issue. It should be noticed, that the bond set out on oyer, is dated the 29th July, 1841.

In the progress of the trial, the execution was offered in evidence, which is indorsed, "came to hand same day as issued.—Wm. C. Price, sheriff. Satisfied in full, Wm. C. Price, sheriff." One Wilkins was offered as a witness on behalf of the defendants, Williams and Haynes, who stated that he was in the court house at the time of the signing of the bond, but did not recollect that he was present in the same room and at the same time of the signing by the sureties; that as agent for the sheriff, he had made an arrangement for the signing of the bond, and procured the sureties and the promise of signing by those other persons who did not sign it, because he was to be the deputy of the said sheriff; it was his understanding, and he knew it was so understood by Williams and Haynes, that Lawson, Crow and Dothard, were to sign the bond, together with them, and he still supposed they were all going to sign it; and knows that Williams and Haynes so understood it at the time of their signing; yet he had himself, about the time of his signing, advised Lawson, Crow and Dothard, not to sign it, as Williams and Haynes, had secured some property from the sheriff, which would be some indemnity to them;

but Williams and Haynes signed the bond without knowing that he had so advised. He also stated, that Williams and Haynes obtained a negro man from Price. The evidence of this witness was excluded from the jury.

Burt, one of the defendants in the execution, was offered as a witness to prove that something else than money was received by the sheriff as the consideration for the indorsement of satisfaction on the execution. And also, to prove the arrangement between himself and the deputy sheriff, which led to the indorsement of satisfaction. The plaintiff objected to the competency of this witness on the ground of interest, and the court sustained the objection.

Wilkins, the witness first named, was asked, 1. To state all he knew in reference to any arrangement made for the satisfaction of the execution then shewn to him, between the sheriff and his deputy. and the defendants in execution, or either of them.—2. What was received by the sheriff in satisfaction of the execution. 3. Was not a gold watch received from defendants in satisfaction, in consequence of which, the return of satisfaction was made.

These questions were all objected to by the plaintiff, and the objection sustained.

The plaintiff's counsel was introduced as a witness, and was proceeding to state, that a week or two after the return term of the execution, he was called on as plaintiff's attorney, by a person who represented himself as the holder of witnesses receipt for the note on which the judgment warranting the execution was founded. Witness had never before or since, seen this person, and he did not shew the receipt. One Doct. Fuller applied to witness for the money due on the execution, and showed him his receipt, whereupon witness went to the sheriff and demanded the money, when Price told him he had collected the money, but did not have it then, but would in about a week.—About a week afterwards, the person referred to as unknown, came to witness as before stated, and the witness made a demand of the money of Price, in his presence. The defendants resisted the introduction of this evidence, and excepted to its admission, as they also did to the several rulings of the court before mentioned.

The defendants, Willlams and Haynes, asked the court to

charge the jury, that the execution and return upon it, made by Price as sheriff, was *prima facie* evidence of what it purported to be; and that the indorsement on the same of "came to hand same day as issued. Wm. C. Price, sheriff. Satisfied in full. Wm. C. Price, sheriff," was *prima facie* evidence in the absence of all other proof, that the execution was satisfied on the same day it came to the sheriff's hands. And that if the jury believed that the execution was satisfied on the same day it came to hand, to wit, the 26th July, 1841, then the said Williams and Haynes having executed the bond on the 29th of that month, were not liable. This charge the court refused.

The court was also requested to charge the jury, that to authorise the plaintiff to recover in this case against Williams and Haynes, it was incumbent on him to prove that the execution was satisfied, and the money collected and received by the sheriff subsequent to the time when the said Williams and Haynes became his sureties, which charge the court refused, and the defendant excepted.

All the questions raised in the court below, are opened by the assignments of error, and in addition, it is insisted that the notice of the motion is defective in not setting out when the money was demanded from the sheriff.

T. A. Walker and S. F. Rice, for the plaintiffs in error, insisted,

1. That it was necessary to aver in the notice or allegation, the time when the money was demanded, and that for this omission, the demurrer to the plea should have been visited upon the notice. [Barton v. Peck, 1 S. & P. 486; Broughton v. State Bank, 6 Porter, 48.]

2. Sureties of a sheriff are not liable for improvident contracts made by their principal, and it was competent for them here to shew, that no money was received on the execution. [Bobo v. Thompson, 3 S. & P. 385.]

3. The effect of the return, unexplained by evidence, is to refer the satisfactian to the earliest time it could have been satisfied. This would be previous to the engagement of the sureties, and therefore, they are not liable. [U. S. v. Giles, 9 Cranch, 212; Fitts v. Hawkins, 2 Hawks, 394; 11 Gill & J. 382; Townsend v. Everett, 4 Ala. Rep. N. S.]

4. The refusal to charge, as asked for in the second instance, is manifestly erroneous, whatever may be the *prima facie* intendment from the return.

WM. B. MARTIN, *contra.*

GOLDTHWAITE, J.—1. It is true, that in this notice there is no averment with respect to the day upon which the money collected upon this execution was demanded from the sheriff; nor do we think its omission is such a defect as can be reached on demurrer. The allegation is, "which said monies you (the sheriff) have failed to pay over on demand of the plaintiff." From this, in connexion with the other averments in the notice, it is evident the demand was made before the notice of the motion, and after the collection of the money, If a demand was alleged on a particular day, the precise day would be immaterial, and proof of a demand within these periods, would be sufficient. The cases of Burton v. Peck, [1 S. & P. 486] and Broughton v, State Bank, [6 Porter, 48] only require a demand to be specially averred and proved, but neither case has been considered as requiring a precise day to be set out.

2. The two pleas first pleaded, assume that the execution was returned by the sheriff, and may be considered as alleging that a return of satisfaction was made. Without this intendment, they are fatally defective, as presenting no issue whatever; and with it, they are bad, because the return, in its nature, is conclusive, so long as it continues on the record. Without undertaking to determine that the sheriff would be allowed to relieve himself from liability by altering his return, it is certainly conclusive on him, and his sureties, in the absence of fraud or collusion, so long as it remains.

3. The third plea, if pleaded in form by the sheriff, might be considered substantially as a general issue, there being no statement of the return of the execution in the notice; but it is bad as being pleaded by the sureties. In the case of McClure v. Colclough, [5 Ala. Rep. 65,] (see also, Williamson v. Howell, 4 Ala. Rep. 693; Townsend v. Gordon, ib. 607,) we held that our statutes which authorise summary judgments against sureties, without notice to them, or by giving notice to their principal, were intended, and have the effect to make the judgment against the prin-

cipal conclusive of every matter found by it; and that so long as the principal is alive, and is made a party, the sureties are not entitled to litigate the question of liabillty, except in the name of the principal. This plea goes to the liability of the principal, and is in the name and on behalf of the sureties; it is bad, therefore, within the cases cited

4. The evidence of Watkins was properly excluded under the authority of Bibb v. Reed & Hoyt, [3 Ala. Rep. 88] as not tending to show that the sureties here retained the intention not to be bound, unless others also executed the bond; and likewise, for the additional reason that the condition of the delivery, if in fact there was any such, was not known or communicated to the person receiving the bond.

5. The evidence of Burt was properly excluded, but for a wrong reason. The fact offered to be proved by him, would have contradicted the sheriff's return of satisfaction, which we have before stated, is conclusive upon the sheriff and his sureties, until set aside. We do not understand Bobo v. Johnson, [3 S. & P. 385] as establishing the position contended for, because the question raised there was, whether the plaintiff in execution could be concluded by the illegal act of the sheriff. Whether the sureties on a proper shewing could have had the return set aside, and the true facts inquired into, to the prejudice of the plaintiff's rights, or otherwise, is a question not raised, and which, therefore, we decline to consider.

The evidence subsequently offered from the witness Watkins, is of the same description, and its exclusion proper, for the same reason.

6. The return of satisfaction, without any date or evidence in connexion with it, refers to the return day of the execution, and therefore, the court properly refused to charge, that the *prima facie* intendment was, that the execution was satisfied on the 26th July, that being the day when the sheriff received it.

7. The refusal to charge, that it was incumbent on the plaintiff to show, to authorise a judgment against the sureties, that the execution was satisfied, and the money collected and received by the sheriff subsequent to the time they became his sureties, was clearly erroneous, if it must be understood as instructing the jury that these parties could be liable unless the default of the sheriff was subsequent to the period when they became bound; but we

are not warranted in putting this construction on the charge; it must be understood with reference to the matter which immediately preceded it, which was with reference to the *prima facie* intendment to be drawn from the return, unaided by other evidence; after ascertaining the opinion of the court, that the return must be referred to the return day, the effort then was, to get the instruction that the plaintiff must explain by proof when the *money was received.* Now, the court very properly declined the charge in this connexion. It would have been entirely competent for the court to have said, that under that return, it was unnecessary for the plaintiff to introduce other proof than was already before the jury, it being in proof that the sureties were such previous to the return. In this view of the circumstances, in connexion with the charge, we think it free from error. [McCutchen v. McCutchen, 9 Porter, 662.]

Judgment affirmed.

BASKIN, Adm'x., v. SAMPLE.

1. A recovery on a count for money had and received, cannot be had on proof that the administratrix of one executing a receipt for the collection of several claims, paid on demand, one of the claims, and refused further to account or to explain the other items of the receipt.
2. To recover on the money count, it is necessary to prove that the money has been received, or at least some proof must be made from which such an inference can be drawn.

Error to the county court of Montgomery.

Assumpsit by the defendant against the plaintiff in error. The declaration contains the money counts.

Upon the trial, the plaintiff offered in evidence the following instrument of writing, proved to have been made by the defendant's intestate.

"Received of J. H. Sample the following claims: James Craw-

ford, for $8 12; Witherington, garnishment, $45 18; one on J. R. Parker, for $40, due the 25th December, 1836, with a credit of $20, April, 1837; one on L. D. Orams, for $6 12, due 1st June, 1837—garnishment March 30, 1838.

P. B. Baskin, Constable."

The plaintiff also proved, that the receipt was presented to the defendant as administratrix after the death of her intestate, and a settlement demanded; that she settled in full the claim against Witherington, but did not account for any other item in the receipt, and refused to do any thing further in the matter. The defendant offered evidence conducing to prove that Orams and Crawford, named in the receipt, were insolvent; and by Parker, that he was good for the amount named in the receipt, but had no recollection of the claim, and had settled with defendant's intestate, after the date of the receipt, all just claims against him.

The defendant's counsel asked the court to charge, that the plaintiff could not recover in this action unless he proved that defendant's intestate had received the money on the claims put in his hands. The court gave the charge, and charged further, that if the defendant refused to account upon the receipt when presented, and gave no explanation of the disposition of the other claims, that it was *prima facie* evidence that the money was received to the extent of the claims specified in the receipt, unless rebutted by proof of the defendant.

This charge was excepted to, and is now assigned for error.

Hayne, for plaintiff in error, cited 4 Ala. 505.
Harris, *contra*, cited 7th Johns. 132.

ORMOND, J.—To entitle the plaintiff to a recovery in this action upon the count for money had and received, it was necessary to prove to the jury that the money had been collected from the persons named in the receipt. No presumption can arise that the money had been received, because the administratrix refused to account and pay over, or to explain the actual state of the case. No such inference could be drawn from the facts if the presentation had been to the intestate in his life, much less to his administratrix, who may have been entirely ignorant of the facts.

The conduct of the administratrix is perfectly consistent with the insolvency of the persons from whom the money was to have

been collected. But whether they were solvent or insolvent, was unimportant: the fact to be proved was, that the money had been collected from them; or at least some proof must have been offered from which such an inference would arise.

For the error of the court in its charge to the jury, its judgment is reversed, and the cause remanded.

JACKSON v. HUGHES.

1. Interrogatories, filed pursuant to the act of 1837, in order to obtain the plaintiff's testimony, may be served either on the plaintiff, *or his attorney;* and if not answered, the suit may be dismissed, or continued, with the view of obtaining answers.

WRIT of error to the Circuit Court of Barbour.

This was an action of assumpsit, commenced by attachment on two promissory notes, at the suit of the defendant in error against the plaintiff. A judgment was rendered for the plaintiff for the amount of the notes and interest, reciting that the defendant had withdrawn his plea. Previous to the rendition of the judgment, the defendant excepted to the ruling of the court. The question arising upon the bill of exceptions is, whether interrogatories filed pursuant to the statute, in order to obtain the plaintiff's testimony without resorting to a bill of discovery in chancery, should be served on him personally? The judge of the county court decided, that such service was indispensable, although publication had been made in a newspaper for sixty days requiring the plaintiff to answer the interrogatories, and declaring, as a consequence of his neglect, that the same would be considered as affirmatively answered; and although the interrogatories were pertinent and material, and a copy of them had been served on plaintiff's attorney six months previous to the sitting of the court. It was not only adjudged that the service

was insufficient, but, in the language of the bill of exceptions, *"the interrogatories were ruled out."*

The cause was removed to the circuit court by writ of error, where the matter of the bill of exceptions was assigned for error, and the judgment of the county court affirmed.

WILEY, for the plaintiff in error.

No counsel appeared for the defendant.

COLLIER, C. J.—It is admitted that the interrogatories had been regularly filed, and were such as the act of 1837 authorized to be exhibited in lieu of a bill of discovery. In such case the statute enacts, if the party to whom interrogatories shall be so propounded, and who shall be so required by the court to answer the same, shall, in sixty days after notice and a copy of such interrogatories served on him, fail to make answer in manner aforesaid, or shall answer the same evasively, the court may attach him and compel him to answer in open court, or it may continue the cause and require more direct and explicit answers; or if the party to whom such interrogatories shall be propounded, be defendent in the action, it may set aside his plea or pleas, and give judgment against him as by default; or if the plaintiff, may order his suit to be dismissed with costs, as shall, in the discretion of the court, be deemed most just and proper." [Clay's Dig. 341, sec. 160.] The failure of the plaintiff to answer the interrogatories did not authorize the court to consider the truth of the facts which they sought to elicit, as either admitted or denied. It is true, that in case of such neglect on the part of a plaintiff, the court is invested with a discretion; but this does not extend so far as to anticipate his answers by prescribing their terms; it relates only to the suit itself, which may be dismissed, "as shall be deemed most just and proper." If the court shall believe that justice would be most promoted by continuing the cause until the interrogatories are answered, it is certainly competent under the discretion conferred by the statute, thus to dispose of it.

The act of 1818 provides that "In all cases pending before any of the courts of record, written notice to the attorney of record shall be as valid and legal to all intents and purposes, as if served on the party in person." [Clay's Dig. 337, sec. 137.] This statute was, it is true, enacted long before that which invested

the courts of law with the power to compel discoveries upon the oath of either party; yet, so far as applicable, it operates upon subsequent legislation, and the question is, whether, in the present case, the act of 1837 is so explicit and imperative in its requirements, as to make a personal service of the interrogatories on the party indispensable. We cannot think that there is anything in the statute or the subject matter to which it relates, which requires a construction so stringent. Notice to an attorney of the time and place of taking a deposition, it is well settled, is equivalent in law to notice to his client. This principle rests upon the fact that he represents the latter in respect to the cause; and that, as it is his duty, it is supposed he has such intercourse and correspondence with his client, as may be necessary to enable him to conduct the suit or defence. This reason seems to apply with all force to the case at bar. In truth, we can discover no reason to warrant us in repudiating the application of the act of 1818.

In refusing to consider the interrogatories as answered affirmatively, the county court administered the law correctly; but it erred *in ruling them out of court*—that is, as we understand it, in deciding that the notice was not such as authorized a dismissal of the suit, or its continuance with the view of obtaining the answers of the plaintiff.

The judgment of the circuit court, affirming that of the county court, is reversed; and this court, rendering the proper judgment, reverses that of the county court, and thence remands the cause for further proceedings.

HILL & DILL v. DUKE.

1. Where a father, upon the marriage of his daughter, or afterwards, sends home a slave with her, which remains in the husband's possession for ten years, the presumption that it was a gift, must be explained or rebutted by satisfactory proof that it was notoriously understood not to be a gift at the time; and even ifthere is such proof, it is not too much to say that a strong presumption arises,

which will warrant the inference of a subsequent absolute gift. when the contest is between a creditor and the donor.

WRIT of error to the Circuit Court of Benton county.

Trial of the right of property to a certain slave, levied on by an execution in favor of Hill & Dill against one Adams, and claimed by Duke.

At the trial, it was shown in evidence that Hill & Dill were creditors of Adams, in Georgia, previous to 1840, when the latter removed from thence to Alabama, where they sued him and recovered judgment. The execution on this judgment was levied on the slave in controversy. Adams, in 1830, married the daughter of Duke, in Georgia, and when the new married couple went to house keeping, Duke sent a negro woman slave home with his daughter. This slave was the mother of the one levied on; and, with her subsequent increase, remained in Adams' possession from his marriage up to the time of the trial. In the year 1840, Adams executed to Duke an instrument in writing, stating that he had received the woman slave first mentioned and her four children, among which is the slave levied on, which were loaned by Duke to his daughter, the wife of Adams, and that he was to have them whenever he called for them. Adams was called as a witness for the claimant, and said that he always considered the slaves as belonging to Duke; that the woman slave was loaned to him for the use of his wife; that he set up no claim to the slaves, but had paid taxes for them in this State in the name of Duke, and that Duke himself paid taxes for them while they were in Georgia; that Duke came to Alabama about three months after witness removed here, and took one girl from him, which had been loaned in the same way, but was prevented from taking the others because he could not procure a waggon. He then left them in witness' possession upon his executing the written instrument before mentioned.

On this state of proof, the court charged the jury, that the sending of the slave home with the daughter on her marriage, was *prima facie* evidence of a gift by the father; but this intention was susceptible of explanation; and if the jury believed that the slaves had been in the possession of Adams in this State for three years before the levy, the slave levied on was subject to the

execution; if not, they would find for the claimant; and that the possession of the slaves by Adams, in Georgia, had nothing to do with the case.

The plaintiffs then requested the court to charge the jury, that if, from the evidence, they believed the woman slave was sent home with Adams on his marriage, either as a gift or as a loan, and that the slave had remained in Adams' possession for ten years in the State of Georgia, without interruption, and that the slave levied on was born in his possession, and continued therein until the levy, then that a subsequent contract, or the contract evidenced by the instrument in evidence, did not divest the title of Adams, without some change of possession; and, therefore, the slave levied on was subject to the execution. This was refused; and the jury was instructed, that it did not matter how long the slave remained in Adams' possession. If it was held as a loan, the possession did not change the right of property as to Duke; and hence the slave was not subject to the execution.

The plaintiffs excepted to the several charges as given, as well as to that refused; and now assign the same as error.

T. A. Walker, for the plaintiffs in error, cited, Myers v Peak, 2 Ala. Rep. N. S. 659; Oden v. Stubblefield, 4 ib. 40; 4 McCord, 228; Wheeler's Law of Slavery, 72; 4 Cranch, 219; 9 ib. 212.

W. B. Martin, *contra.*

GOLDTHWAITE, J.—We think the charge of the circuit court, so far as it asserts that the possession of the slaves by Adams, in Georgia, had nothing to do with the case, cannot be sustained.

Independent of our statute of frauds, the question before the jury was, whether Duke parted with the possession of the slave sent home with his daughter after her marriage, as a loan, or as a gift. In this aspect, there could be few facts of more weight than the long continued possession of the husband. It is certainly correct, that the presumption which arises when a father sends slaves home with a daughter upon or after her marriage, may be rebutted or explained; but this must be done by clear and satisfactory proof that it was notoriously and expressly understood

not to be a gift at the time. [Carter's Ex'rs v. Rutland, 1 Hayw. 97; Killingsworth v. Zollicoffer, 2 ib. 72; Robinson's adm'r v. Devore, 2 ib. 151.] It is not very material in the investigation of such a question, what the transaction is called by the parties, as it becomes a loan or a gift according as there is, or is not, an intention on the part of the father to resume the possession at some future time. It is indeed very difficult to draw a distinction between a loan for an indefinite period of time, by a father to a child, when no definite object is to be accomplished by the loan, and an absolute gift. But when such a loan is extended over a period of ten years, and no period is fixed for its determination, it is not too much to say, in a contest between a creditor and the donor, that a strong presumption to infer a subsequent absolute gift is well warranted, even if the bailment was originally designated as a loan between the parties themselves.

We forbear to express any opinion upon the charge requested, further than that it seems to have considered the case as a question of law upon the facts proved, when it was only one as to the intention of the supposed donor at the time when he parted with the slave, or at some subsequent time.

Judgment reversed, and cause remanded.

CUTHBERT, ET ALS. v. LEWIS.

1. By the act of 1843, to regulate the expences of the county of Mobile, certificates of State witnesses are to be paid out of the fund in the treasury, arising from fines and forfeitures.
2. The decision of the commissioners, appointed under the 12th section of the act of 1843, that a claim against the county, is valid, is conclusive upon the county.
3. A declaration by the commissioners, of the fund out of which a claim declared valid by them is to be paid, is void for want of authority, and therefore the county court cannot take jurisdiction, by appeal from such a determination of the commissioners, and its judgment on such appeal is a nullity.
4. When a claim has been declared valid by the commissioners, it is the duty of the court of roads and revenue to make the necessary order, and if it refuses, a *mandamus* is the proper remedy.

Error to the Circuit Court of Mobile.

This was a petition to the circuit court, for a *mandamus* to the defendants.

The petitioner states, that he is the owner and holder of certain witness certificates in State cases, in which the defendants were either acquitted, or are unable to pay; that the certificates were submitted to the commissioners appointed under the act of the 11th February, 1843, to regulate the expenditures of the county of Mobile, and allowed by them, payable out of the funds then, and to come into the hands of the treasurer of the county of Mobile.

The petitioner feeling himself aggrieved by this decision, because the certificates were not recognized as a county charge generally, appealed to the county court, by which the claim of petitioner was recognized as a county charge. That Henry Stickney, the treasurer of Mobile county, has in his hands an amount arising from fines and forfeitures, sufficient to satisfy the claim, but refuses to do so unless the commissioners' court will make an order directing him to pay the same, which order a majority of that court refuse to make.

The prayer of the petition is for a *mandamus* to the commissioners' court to make the order on the treasurer for the payment of the tickets, and on the treasurer to pay the money.

The circuit court granted a rule *nisi*. The minority of the commissioners' court answer and express their willingness to make the order as required, The treasurer and the majority of the court in their answer, insist that the award of the commissioners, under the act of 11th February, 1843, did not finally establish the petitioner's claim. That the decision of the Judge of the county court reversing the award of the commissioners, was void, for want of jurisdiction, and that there is no fund in the hands of the county treasurer for the payment of such claims.

Upon the return of the conditional rule, the court made an order directing that a peremptory *mandamus* issue to the commissioners' court, commanding it to make an order, requiring the treasurer to pay the claim of the petitioner out of the fund in his hands arising from fines and forfeitures.

From this order, the defendants prayed and obtained an ap-

peal to this court, and now assign for error, 1. The court erred in awarding a peremtory *mandamus*.

2. The court erred in the particular order made.

3. In not dismissing the petition.

4. In rendering judgment upon the record.

5. In directing the exercise of a discretionary power in a particular mode.

6. In rendering a judgment contrary to the judgment of the county court, whilst that was in force.

7. In directing the claim to be paid out of funds in the hands of the county treasurer.

Gibbons and Phillips, for appellants. The decision of the cause must depend on the proper construction of the different acts of the legislature relating to the subject. These are, the act of 1823, [Clay's Dig. 600, § 7.] The private act of 1836, for the establishment of schools—the act of 1839, [Clay's Dig. 578, § 19,] and the act of 1843, to regulate the expenditures of the county of Mobile.

The true construction of the act of 1843, is not to make the decision of the commissioners appointed to examine into the validity of claims of this description, binding on the commissioners' court of roads and revenue—they are merely a board to "inquire" and "report" to the commissioners' court for its future action, and their decision cannot be appealed from.

The construction of the local law of 1836, by which the clerk is required "to retain and pay over, out of fines and forfeitures, &c," is that he shall retain and pay over to the witnesses, and not that he shall pay into the county treasury.

The judgment of the commissioners was merged in the subsequent judgment of the county court, which cannot be reversed by *mandamus*.

The act of 1839, cannot reach this case, because it does not appear that the certificates were endorsed by the clerk, as required by that act, to make them a county charge.

A later statute, general and affirmative, does not repeal a former one which is particular. [Gregory's case, 6 Coke, 19.]

The *mandamus*, compelling the commissioners' court to do an act in a particular mode, as to which it had a discretion, is erroneous. [9 Peters, 602.]

DARGAN, *contra.* It is unnecessary to inquire whether Lewis was bound to submit his claim to the commissioners; he has done so, and they have reported in favor of his claim. Therefore, it is a debt against the county, beyond all controversy. But how is it to be paid—out of the fines and forfeitures, or out of the county funds generally? In construing all the acts together, it will appear that the act of 1839 does not enlarge the fund out of which witnesses are to be paid. But if it does so enlarge the fund, and makes the certificate of witnesses a charge on the county generally, the act of 1843 limits the fund in Mobile county to *fines and forfeitures,* and if we submit to this limitation, surely the county cannot complain.

Under this record, we have the right to be paid out of the fines and forfeitures. Our debt was ascertained, and the inferior court refused to make the order of appropriation. Our only remedy is by *mandamus.* [4 S. & P. 154; 3 Porter, 412; 7 id. 47.]

ORMOND, J.—To a proper understanding of this case, it is necessary to take a succinct view of the several statutes which bear upon the question.

The general law of 1823, [Clay's Dig. 600, § 7,] makes the certificates of witnesses on behalf of the State, in criminal cases, receivable in payment of public dues, and requires the county treasurer to pay off and discharge them, out of any fines and forfeitures which may come into the county treasury.

The private act of 1836, for the establishment of schools in the city of Mobile, gives the fines and forfeitures, and the tax fee of two dollars for the support of schools in the county of Mobile; the proviso to the 11th section, requiring the clerk of the circuit court to retain and pay over, out of fines and forfeitures and tax fees on writs, a sufficient sum to pay witnesses on the part of the State.

The public act of 1839, [Clay's Dig. 579, § 19,] makes it the duty of the circuit clerks, on issuing witness cirtificates, when the State fails to convict, or the defendant is unable to pay the costs, to endorse that fact on the certificate, as evidence that it is a county charge.

Thus the law stood until the passage of the act of 1843, to regulate the expenditures of the county of Mobile. The 1st section

declares, that all monies arising from fines and forfeitures, shall be paid into the county treasury. The 3d section provides, that the attendance of witnesses on the part of the State, shall be a charge on said fund. By the 7th, the clerks are required to keep an accurate account of all State witnesses and jurors certificates, and immediately upon the adjournment of court, to make out a complete statement, and furnish the same to the county treasurer. The 9th section prohibits the county treasurer from paying over any money, but in pursuance of an appropriation by the proper court. The 12th section requires the county court to appoint three commissioners to inquire into the amount of debt due by the county, and the evidence in support of it. That they shall give notice for all persons having claims, to present them—notice to be given for six weeks, and a day appointed for hearing the claims—all claims not presented in three months to be barred; and it shall be their duty to determine upon the validity of each and every claim so presented, and to make a report on the same, to the commissioners of roads and revenue, and any claimant, when the claim shall be rejected, may appeal within ten days from the decision of the commissioners to the county court, where the matter shall be heard *de novo*, and in case of a rejection, not appealed from, the claim shall be forever barred. [Pamphlet Acts, page 77.] By this act, the Legislature appears to have made an effort to rescue the subject from the obscurity in which it was envelloped by the previous mass of legislation. We propose to consider, first, the design of the appointment of the commission to investigate and pass on the validity of outstanding claims—was its decision, that the claim was valid, binding on the court of roads and revenue?

This question is certainly not free from difficulty, but we incline to the opinion that it was. The commissioners were to inquire into the validity of the claim—the claimants were bound to present their claims within a certain time, or the claim was barred, and their rejection of the claim, not appealed from, in ten days, was final against the claimant. These attributes of this court, for such in effect it was, would hardly have been conferred upon it if it was not intended, that its action should conclude the county. Nor does it affect this conclusion, that the county was not allowed an appeal It is the case of the body politic, submitting claims against itself, to the determination of its own tri-

bunals, to which it is presumed it may always confide its interests. But a more conclusive reason still is, that if the commission decided against the claimant, he might appeal to the county court, where the matter was to be tried *de novo*, and if the judgment of the commission was reversed, and the claim confirmed, certainly that judgment was binding on the court of roads and revenue, yet no reason is perceived why more conclusiveness should be accorded to a judgment of one tribunal than the other, in favor of the claimant.

Was the decision of the commission in this case, such an one as could be appealed from. The extent of their power was "to determine on the validity of the claims presented;" with the fund out of which the claim was to be paid, they had no concern; that was a matter not left to their judgment, but to be ascertained by the law making provision for the payment of such claims. The effect of their judgment was, therefore, merely that the claims were valid—their declaration of the fund out of which it was to be paid, was an assumption of power not conferred on them, and therefore, not binding on any one, although in this instance, correct. From this it results, that the county court had no jurisdiction of the appeal, and its judgment, thereupon, is a nullity.

The question then returns, out of what fund were these claims payable. The general law is, that State witness tickets shall be paid out of the fund arising from fines and forfeitures in the county treasury: [Clay's Dig. 600, § 7,] they were therefore, not a general county charge. This was not changed by the act of 1836, for the establishment of schools in Mobile. That fund was still preserved for the payment of such claims, and the surplus only, if any, to be paid to the school commissioners, and it is very unimportant to inquire, whether the surplus was paid into the county treasury, or directly, by the clerk of the circuit court, to the school commissioners.

No change whatever was made in the law, in this respect, by the act of 1843. The first section directs the monies arising from fines and forfeitures, to be paid into the county treasury, and the third section declares that the attendance of State witnesses shall be a charge on said fund. This was then merely a restoration, or more properly, a re-enactment of the general law. From this examination, the following conclusions have been attained. That the decision of the commissioners was final, in favor

of the claimant—and that it became a charge on the fund in the county treasury, arising from fines and forfeitures. But as the 9th section of the act of 1843, forbids the county treasurer to pay over any money but in pursuance of an appropriation by the proper court, which is the court of roads and revenue, and as that court, on application, has refused to make it, we come to the consideration of the question, whether a *mandamus* was the proper remedy.

A *mandamus* will lie whenever the party has a clear specific legal right, and no other specific legal remedy adequate to enforce that right. [Jones, *exparte*, 1 Ala. Rep. 15, and authorities there cited.] Thus, where an ancillary attachment was improperly dismissed, a *mandamus* is the appropriate remedy. [Boraim & Co. v. DuCosta, 4 Ala. 393.] So, where a nominal plaintiff was improperly permitted to dismiss a suit. [Brazier v. Tarver, ib. 569.] Also, where a motion for a new trial was continued, and at the succeeding term, the court refused to hear it.—[Bridges & Beers v. Miller, 3 Ala. 746.] It is true, that in a case where the inferior tribunal has a discretion, it will merely be required to act, and this court would not, by *mandamus*, prescribe the judgment it should render; but that is not this case. The defendant in error has a clear legal right to an order on the treasurer for the amount of his claims found by the commissioners to be valid, and the court of roads and revenue have no discretion, but should make the appropriation, in order that the treasurer may be authorized to pay the money, if in the treasury. The order of the circuit court, therefore, directing the court of roads and revenue to make the necessary order for the payment of the claims, out of the fund arising from *fines and forfeitures*, was necessary and proper.

It is not material that it does not appear that the clerk of the circuit court made the endorsement on the certificates, required by the act of 1839; all inquiries of that kind are foreclosed by the decision of the commissioners, adjudging the claim to be valid.

Let the judgment be affirmed.

HUBBERT v. COLLIER, BY HIS NEXT FRIEND, &C.

1. Where a case, in which the amount in controversy exceeds fifty dollars, is submitted to arbitration, upon the order of a justice of the peace, under the act of 1824, if one-half of the referees sign an award, it is competent to show that some of the others who did not sign it, gave their assent to it; or if the award is so defective as not to conclude in itself the controversy submitted, can it be assisted by parol proof?
2. Where a plaintiff, suing by a *prochein ami*, describes himself in the writ and declaration, as an infant under the age of twenty-one years, and the defendant pleads "not guilty," and "accord and satisfaction," the pleadings admit the plaintiff's infancy; and in such case, a submission to arbitration and award not being obligatory on him, may be rejected as evidence.
3. In an action of trespass, an arbitration and award must be specially pleaded, and cannot be given in evidence under the plea of accord and satisfaction.
4. Where the defendant goes to trial without objecting that there was no replication to a special plea, he cannot be allowed to make the objection on error.
5. It cannot be objected, on error, that the declaration on which an issue has tried, was entitled of an improper term.
6. After a verdict, in an action of trespass, the defendant cannot object to the declaration, that it alleges the trespass to have been committed on a certain month, without particularizing the day.

WRIT of error to the Circuit Court of Fayette.

This was an action by the defendant in error against the plaintiff, to recover damages for an assault and battery upon his person. The cause was tried on the plea of *not guilty*, and *accord and satisfaction*.

The judgment entry recites, that the parties came, by their attorneys, and thereupon came a jury, &c., who were elected, &c., to try the issue joined, &c. A verdict was returned in favor of the plaintiff for the sum of six hundred and twenty-five dollars, and a judgment was rendered accordingly.

On the trial, the defendant excepted to the ruling of the court. From the bill of exceptions, it appears that the defendant offered to read to the jury the following writing:

"The State of Alabama, Fayette county. This day came Matthew Hubbert and Barnett Collier, sen., and Barnett Collier, jun., after having agreed to leave their dispute to referees, and

made out a particular statement, as follows: we do mutually agree that the assault and affray, by Matthew Hubbert and others, on the body of Barnett Collier, jun., each claiming damages, &c. (Signed,) MATTHEW HUBBERT,
BARNETT COLLIER,
BARNETT COLLIER."

"The State of Alabama, Fayette county.—Know all men, that Matthew Hubbert, Barnett Collier, jun., Barnett Collier, sen., of said county, have agreed to submit the demand of each party made of the other, to the determination of Walter Harkins, Edwin Harris, Adly Harris, William Erwin, William Cole, Andrew McAlab, Robert Logan, Charles Stewart, Daniel Ford, Zachariah Tankersly, Henry Gordon, Hugh McAlab, the report of a major part of whom being made as soon as may be, to any justice of the peace of said county, judgment thereon to be final.

(Signed,) MATTHEW HUBBERT,
BARNETT COLLIER,
BARNETT COLLIER."

Endorsed thus: "This day the abovementioned Matthew Hubbert, Barnett Collier, jun., and Barnett Collier, sen., appeared personally before me, and acknowledged the above instrument to be their free act. Given under my hand this the 21st day of October, 1841. (Signed.) WILLIAM J. SPARKS."

Also, endorsed thus: "The referees believe each party to be guilty, and by that, each party pay his own costs.

(Signed,) WALTER HARKINS, ADLY HARRIS,
ROBERT LOGAN, WILLIAM ERWIN,
HENRY GORDON, C. A. STEWART."

The reading of this paper as evidence being objected to, the defendant's counsel proposed to introduce testimony to sustain it, and also to supply its deficiencies; but the court rejected such auxiliary or explantory proof; thereupon the defendant excepted, &c.

WM. R. SMITH, for the plaintiff in error, made the following points:

1. The submission to arbitration, and the informal award thereupon made, are not writings so conclusive, that they cannot be explained or assisted by extrinsic proof. The subject matter of controversy was doubtless such as might be submitted to ar-

bitration; and as that is a mode of adjusting matters of difference much favored in law, all reasonable intendments are made in favor of awards. And the authorities very satisfactorily show, that the testimony of witnesses has been admitted to uphold the decision of arbitrators, where the written evidence was quite as defective as it is in the present case. [Clay's Dig. 51, § 7; id. 52; 1 Litt. Rep. —; Litt. Sel. Ca. 264; 2 Starkie's Ev. 136; 2 A. K. Marsh. Rep. 439; 7 Cow. Rep. 290; 13 Maine Rep. 367; 2 Bibb's Rep. 158; Watson on Arb. & Aw. 122, 131, 127, 8; 1 Bibb's Rep. 420.]

2. Conceding that an infant, or his *prochien amie*, have not the authority to submit to arbitration a case involving the rights of the former, and yet it cannot be assumed, in the present case, that the plaintiff was an infant, for the purpose of sustaining the judgment below. The question of infancy, if it was proposed to place the rejection of the evidence on that ground, should have been found affirmatively by the jury. [3 Bac. Ab. 584; 2 Stewt. & P. Rep. 130; 1 Bac. Ab. 208; 2 Strange's Rep. 937; 2 Starkie's Ev. 724; 2 Bul. N. P. 172; 1 Step. Com. 472; 3 Caines' Rep. 256; 2 Tenn. Rep. 431; 1 A. K. Marsh. Rep. 76; 5 Porter Rep. 270; 1 Metc. Rep. 559.]

4. An infant may submit to arbitration by guardian. [3 Atk. Rep. 614; 3 Caines' Rep. 256; Hardin's Rep. 323.] The case of Isaacs v. Boyd, [5 Porter's Rep. 388,] is unlike the present. There, the submission was by the next friend alone; here, the infant united with him in submitting his cause. Where an infant, especially with the advice of his friends, makes a contract which is *prima facie* beneficial, it is not void, even if it may be avoided upon plea. [3 Bac. Ab. 603–4; 3 East's Rep. 340.] Here, the submission was beneficial in prospect, and consequently the award could not be assumed to be void.

3. Although a formal issue to the first plea may not have been necessary, yet as the second is affirmative, and necessarily concludes with a verification, it could not have been tried without a replication; and the verdict and judgment cannot consequently be sustained. [9 Porter's Rep. 145; 4 Ala. Rep. 698; Hardin's Rep. 151; 1 Litt. Rep. 66; Litt. Sel. Cas. 133; 2 Pirtle's Dig. 187; Aik. Dig. 322.]

5. The declaration varies from the writ in being entitled twelve months after the appearance term, [1 Chit. Plead. 439,

673;] and besides, is not sufficiently explicit as to the time the assault and battery was committed.

HUNTINGTON, for the defendant.—1. The award, as it has been called, was not admissible under the plea of accord and satisfaction, even if the defendant below could have availed himself of it under any issue. An *accord* is an agreement between two or more persons, where one is injured by a trespass or otherwise, to satisfy him with some recompense, and the payment thereof is a satisfaction. [Jac. Law. Dic. Tit. Accord.] It admits and atones for the injury, and so far, is a bar to any subsequent action. Unlike a submission to arbitration, it presupposes no matter in *dispute;* but, on the contrary, an agreement as to the subject and amount of the compensation. Where there is an accord and satisfaction, there is no occasion for an arbitration and award. The pleas of accord and satisfaction, and arbitrament are separate, and each defence must be made specially. [1 Chit. Plead. 545.]

2. Entitling the declaration of a term subsequent to that at which the writ is returned, is a matter which cannot prejudice the plaintiff below. If it was a misprison, it would be cured by the statute of amendments of 1824. [Clay's Dig. 322, § 53.] And if entitled of the term when it was in fact filed, it is equally good. [Jones, et al. v. Merrill, adm'r, 1 Ala. Rep. N. S. 217.] A variance between the writ and declaration is only pleadable in abatement. [3 Ala. Rep. 154.]

3. The omission of a replication should always be objected before the trial; by consenting to submit the cause to a jury, the defendant waives such an objection, and cannot be permitted to avail himself of it, on error. [9 Porter's Rep. 145; 3 Ala. Rep. 366; 4 id. 696.]

4. As for the sufficiency of the declaration, it cannot be successfully questioned. It alleges the trespass to have been committed on a certain month, and this is equivalent to laying the injury on a particular day, or on divers days within that month. Be this as it may, the verdict cures the defect, if any.

COLLIER, C. J.—There are cases in which proof *aliunde* has been admitted to aid an award. [2 Phil. Ev. C. & H.'s notes, 1030] But are the defects in the writings adduced in

the present case, of such a character as can be supplied by extrinsic evidence? The attempt of the parties to submit their controversies to arbitration, was intended to conform to the act of 1824, [Clay's Dig. 51,] though it was exceedingly informal. The second section of that statute provides that, "In all cases where the amount of the judgment rendered shall exceed fifty dollars, the same shall be returned by the referees, under their hands and seals, to either the county or circuit court of the county, in which such justice of the peace may dwell at the time of taking the agreement as aforesaid; and the court to whom the report of the referees may be made as aforesaid, shall have cognizance thereof, in the same manner, and under the same rules, as if the referees had been appointed by a rule of said court." The submission itself contemplates a written report by a majority of the arbitrators as a warrant for the judgment of the proper court. Now, but one-half of the referees have signified their assent to the paper which is called the award. In considering the evidence offered by the defendant below, these questions suggest themselves. Does it show a state of fact from which it can be concluded that the referees have adjusted the matters in controversy between the parties, and what is their award? If defects exist in this respect, is parol evidence admissible to remove them? As the submission requires an award in writing, made by a majority of the referees, in order to make it the basis of a judgment, can it be shown that it was assented to by some of those whose names are not subscribed? These questions, we merely suggest, without stopping to consider them, as there are other grounds upon which we can rest our judgment.

2. Admitting the award to be regular in point of form, is it obligatory upon the plaintiff? It is laid down in general terms, that a party may avoid the effect of an award, by showing that he was an infant when he made the agreement of submission. [3 Phil. Ev. C. & H.'s ed. 1034, and cases there cited.] Watson, in his Treatise on Arbitration and Award, [p. 41,] says, "It is quite clear, that a submission by an infant, is either void or voidable"; and his submission will not bind him, unless he ratifies it after he attains his majority. The only doubtful question, as far as regards the infant himself, says the learned author, is, whether the submission is merely void, or voidable only—the decisions on this point being both ways. In Godfrey v. Wade, [6 J. B.

Moore's Rep. 488,] it appears that a cause in which an infant, by his *prochein amie*, was plaintiff, was referred by a parol agreement: the court considered it clear that the infant was not bound by the award, but directed that he should have notice of the award, and if he would not perform it, that the defendant should be at liberty to carry down the record to trial by proviso. But it has been decided that, though an infant cannot submit, his guardian or other person may submit for him, and the person submitting shall be bound by the award; the authorities upon this point are, however, somewhat contradictory. [Watson's Arb. & Aw. 41–2.]

It is argued for the plaintiff in error, that, conceding it is incompetent for an infant to bind himself by submitting his case to arbitration, the fact of infancy could only be established by the verdict of a jury affirming that such was the condition of the plaintiff below. There can be no doubt that, where the question of infancy *vel non* arises directly in judgment, but it must, on a trial at law, be determined by a jury. But in the case before us, the infancy of the plaintiff was not controverted, and the form of the pleas did not allow him to assert the fact in a replication. Both the writ and declaration describe the plaintiff as an infant under the age of twenty-one years, suing by his next friend. The pleas, without questioning the minority of the plaintiff, deny the commission of the trespass; or conceding the defendant's guilt, affirm that he has made satisfaction therefor. This we think was, at least, an implied admission of the legal incapacity of the plaintiff, considering the manner in which that question arose; and as the award was not obligatory upon the plaintiff, the submission and consequent proceedings were properly rejected. Upon this point, the case of Isaacs, by her next friend, v. Boyd, et al., [5 Porter's Rep. 388,] cannot very well be distinguished from the present in principle.

What we have said might be sufficient to show that there was no available accord and satisfaction. But grant that the submission was binding upon the plaintiff, and still the plea of accord and satisfaction would not allow it to be proved. That plea supposes that the parties had agreed upon something to be done, omitted, or rendered, in satisfaction of the cause of action sought to be enforced. Here, there has been no agreement as to the terms of adjustment; it is merely stipulated that certain per-

sons, designated by the parties, shall settle their controversies, and the decision of these persons shall be recognized as obligatory. [See 1 Saund. on Plead. & Ev. 26, *et post.*] In all actions of trespass, whether to the person, personal, or real property, matters in discharge of the action, (it is said,) must be pleaded; as accord and satisfaction, arbitrament, release, former recovery, tender of sufficient amends, and the statute of limitations. [1 Chitty's Plead. 3d Am. ed. 496; 5 Dane's Ab. 611.]

It does not appear that the defendant objected before trial, that there was no replication to his second plea; and, according to repeated decisions of this court, he cannot now allege the want of a replication, as an error, fatal to the judgment. [Abercrombie v. Mosely, 9 Porter's Rep. 145; Clark's Adm'rs v. Stoddard, Miller, & Co. 3 Ala. Rep. 366; Hall v. Dargan, 4 id. 696.]

The circuit court might, in its discretion, have permitted a declaration to have been filed, at any term subsequent to the return of the writ, and its decision could not be revised on error. [Jones, et al. v. Merrell, Adm'r, 1 Ala. Rep. N. S. 217.] Besides, the defendant, by pretermitting an objection to the declaration in the primary court, must be understood to have consented to go to trial upon the one in file.

In the action of trespass, time is not material, and the plaintiff may prove that the act complained of, was committed on a day anterior to that alleged. Whether a declaration is demurrable for not stating the trespass was committed on a *day certain*, we will not stop to inquire. After verdict, we are quite sure the allegation, that it was committed on a certain month, without particularizing the day, is sufficiently specific.

It results from this view, that the judgment of the circuit court must be affirmed.

JOHNSON, ET AL. v. GRAY.

1. In a summary proceeding against a constable and his sureties, for failing to pay over money collected by virtue of an execution, the question to be tried is not merely whether money was collected, but is also, whether it was collected by virtue of the particular execution, which the plaintiff describes in his notice; consequently a misdescription of the execution is a fatal defect, and when it is doubtful, whether money was collected on the execution described, or another, the jury must decide upon which it was collected.

WRIT of error to the Circuit Court of Barbour county.

This is a proceeding by Gray against Johnson and his sureties, to recover a sum of money alleged to have been collected by him as constable, and not paid over upon demand. The notice asserts that this collection was made by virtue of an execution issued by a justice of the peace against Austin H. Smiley, on the 10th of August, 1841. The plea is, that the money mentioned in the execution set out in the notice, was not collected.

The plaintiff introduced the justice of the peace as a witness, and also, gave in evidence his dockets and other evidence tending to establish the necessary facts. The defendant produced an execution against Austin and James Smiley, and proved by the justice of the peace, that this execution was the one issued on the 10th of August, 1841.

On this state of proof, the defendants requested the court to charge the jury, that if they should believe the money was collected by Johnson upon the execution against Austin and James Smiley, and not upon the one set out in the notice, then they should find for the defendants. This was refused, and the court instructed the jury, that it was not for them to take into consideration such variance, if it existed, but their verdict should be founded on the evidence in the case.

The defendants excepted, and have assigned this matter as error.

WILEY, for the plaintiffs in error.
BUFORD, *contra.*

GOLDTHWAITE, J.—In these motions, the question before the jury is not merely with reference to the collection of the money, but also is, whether it was collected by virtue of the particular execution which the plaintiff undertakes to describe in his notice. The consequence is. that when there is a misdescription of the execution, that is a fatal defect. In the present case, the evidence seems to have left it doubtful whether the money was collected by virtue of an execution against Austin Smiley, or by virtue of one against him and another person. This doubt was proper to be solved by the jury, and therefore, we think the court erred, in charging that they could not consider the question of variance.

Judgment reversed, and cause remanded.

TANKERSLY, ET AL. V. THE STATE BANK.

1. It is not essential that an election to ascertain the sense of the township, as to a sale of the 16th section, should be held *upon* the 16th section,—the commissioners may consult the convenience of the people, by holding it at another place.
2. Where there has been an election in fact, to ascertain the sense of the qualified electors as to a sale of the 16th section, which is not contested within twenty days, and a sale of the land is actually made, all persons are concluded in a court of law, from contesting the validity of the election:—Whether in a case of fraud, on the part of the commissioners, a court of equity might not interfere at the instance of the township—*Quere.*
3. It is not essential to the validity of a sale of a 16th section, that the judge of the county court should issue an order of sale. Nor that the commissioners should return the particulars of the sale to the county court.
4. The certificate of purchase which the commissioners were required to give the purchaser, setting forth the particulars of the sale, was intended exclusively for his benefit, and if defective, will not vacate the sale,—nor will an omission to acknowledge it before a judicial officer, or a defective acknowledgment, affect the rights of the township.

ERROR to the Circuit Court of Sumter.

Assumpsit by the defendant in error against the plaintiff in

error, on a promissory note for $2,462 50, dated 6th July, 1836, and bearing interest at six per cent. from the date. Three other suits on notes for the same amount, being consolidated with this.

To declarations in the usual form, the defendants pleaded *non assumpsit* and failure of consideration, upon which issue was taken, and the following special pleas: 1. That the four notes sued on, were executed by the defendants to James Savage and others, school commissioners of section 16, township 19, range 2, west, for the pretended consideration of lots number one, two, three and four, comprising the north half of said section, pretended by them to be sold to the said Tankersly, under and by virtue of their powers as commissioners as aforesaid, and for no other consideration; and said defendants aver that no election was held *at* said 16th section, to ascertain the sense of the qualified electors, in relation to the sale or no sale of said section, or any part thereof, and this, &c.

2. The second plea sets out the contract as in the first, except that it alleges, "that a majority of the qualified electors in said township, at the time the pretended vote was taken, never voted for a sale of the said section, or any part thereof, and this, &c."

3. The third avers, "that from the time of the pretended election held for the sale of said land, to the time of the pretended sale of the same, Peter Doty was judge of the county court of said county, and never issued an order of sale to said commissioners, to sell said lands, &c.

4. "That since the time of the said pretended sale, neither said commissioners nor their successors in office, have made a return of said pretended sale to the judge of the county court of said county, nor to the clerk of said county, when there was no Judge, &c."

5. That the said commissioners did not, at any time before or since the execution of the said promissory notes, execute a certificate as by law required, but executed and delivered to him a paper, as follows; "At a sale of the one half of the 16th section of land, pursuant to law and notice, we do hereby certify that George Tankersly, being the highest bidder for lots No, 1, 2, 3, and 4, each containing eighty acres, the whole of said lots comprising the north half of section 16, township 19, range 2, west, in the county of Sumter, and having given his notes with surety, as the law directs, upon the payment of the same, the said George

Tankersly will be entitled to a patent for the said land, from the Governor of the State of Alabama."

(*Signed by the Commissioners.*)

6. That the commissioners never executed to said Tankersly, or to any other person in his behalf, any certificate of purchase, setting out the amount of the purchase money agreed to be given.

7. That the said commissioners never acknowledged in open court, or before any judge or justice of the peace for said county, any certificate of purchase for said land."

To these pleas, the plaintiff demurred, and the court gave judgment on the demurrer, against the pleas. And the jury having rendered a verdict for the plaintiff on the issues, judgment was rendered for the plaintiffs.

The assignment of error is, that the court erred in its judgment on the demurrer to the pleas.

Mr Smith, referred to the provisions in the Digest, authorizing the sale of the school lands, and insisted that the power to sell was a privilege to be exercised only by the majority of the inhabitants. That the power intrusted to the commissioners was a naked power, and could only be exercised in the mode pointed out by the statute;—that not having complied with the statute provisions, their acts were void. [2 Kent's Com. 298, 2 S. & P. 190; 2 Cranch, 130; 4 Ala. 70, 588, 622; 4 Wheaton, 77; Angel & Ames on Cor. 189, 192, 212, 14, 229, 33.]

The fact that Tankersly has retained possession of the land, will not prevent him from showing that the act was void. No act of his can impart validity to a void contract, or give to the commissioners authority not conferred by the statute.

Hopkins and Cornick, for defendant in error, contended that the statute had been substantially complied with—that after the lapse of twenty days from the election, the township was forever barred from denying its validity, and that no one else could object to it, and that, therefore, the purchaser could not complain, as he had an undoubted title to the land.

ORMOND, J.—The statutes in force when the sale of the 16th section in this case was made, passed in 1828, will be found in

Aikin's Digest, 377. The 33d section provides, "that it shall be the duty of the school commissioners of the several sixteenth sections in the State, or a majority of them, on the second Monday in May next, on giving twenty days public notice, by advertisement in three of the most public places in the respective townships, to hold an election to ascertain the sense of the qualified electors who may be inhabitants of such township, respecting the sales of their sixteenth sections under the provisions of this act, and the commissioners conducting said election shall, before they open the polls for said elections, take an oath before some person authorised to administer the same, that they will faithfully and impartially conduct the same, and make a true return thereof, according to law; and they shall provide a ballot box, and cause the voters to write upon their tickets, "sale" or "no sale," and they shall keep the polls open from ten o'clock in the forenoon, until four o'clock in the afternoon, at which time they shall close the polls, and count out the ballots, and certify the result to the judge of the county court of the proper county; and if there be no judge in office, then they shall certify the same to the clerk of the county court of the proper county, and shall keep the ballot boxes, with the votes therein, sealed up for twenty days, when they shall be destroyed, if no person contests said election. And in the event any such election be contested, then the judge or clerk, as the case may be, shall have power to decide said contested election."

§ 34. In all cases where a majority of the qualified electors in any township, have chosen to sell the sixteenth section therein, and no person has contested and set aside said election, it shall be the duty of the judges of the county courts, and of the clerk, &c. at the expiration of twenty days from such elections, to issue an order of sale to the commissioners of such sections as are elected to be sold, and said commissioners shall, on the reception of such order, cause," &c.

By the act of 1830, [Aik. Dig. 381, § 49,] the school commissioners were authorised, at any time they thought proper, "to hold an election at their respective sixteenth sections," to ascertain the sense of the township in regard to the sale of the 16th sections, giving thirty days notice thereof at six of the most public places in the township. Other portions of the act will be brought to view as we progress with the examination of the case.

We propose, in the first place, to examine each plea, and compare it with the statute.

1. The first plea seeks to invalidate the sale, because the election, to ascertain the sense of the qualified electors as to "sale" or "no sale," was not held *at* the 16th section. We are of the opinion that it was not the intention of the legislature, that the election should be held upon the 16th section, and that it would be invalid if held elsewhere. It was a mere direction to hold the election upon, or near, the 16th section; and if there was no proper place for holding the election upon the land, the commissioners might consult the convenience of the people by holding it another place.

2. The objection raised by the second plea, that a majority of the qualified electors of the township did not vote for a sale of the land, presents a question of graver import.

The essential pre-requisite to a sale, was the assent of a majority of the inhabitants of the township. To secure, as far as possible, fidelity on the part of the commissioners, they were required to hold the election under the sanction of an oath, previously taken by them; and before they made a sale, to enter into a bond in a large penalty, faithfully to perform their trust. In addition, the very nature of the act contemplates the utmost degree of publicity, and pre-supposes a full knowledge of the facts on the part of the inhabitants; nor is it easy to conceive that every voter would not know the state of the polls as well as the commissioners. Yet, as it was possible that the commissioners might return falsely, that a majority had voted, when they had not, or the election might be invalid from some other cause, twenty days were required to elapse before any sale could take place, during which interval, any one had the right to contest the election. If no one contested the election within the time provided by law, and a sale was actually made, all persons are concluded, at least in a court of law, from denying the validity of the election. There can, we think, be no doubt that it was the intention of the legislature to foreclose all inquiry into a matter which, after the destruction of the ballots, became exceedingly difficult, if not impossible, to ascertain, and thus to enable those who might desire to purchase, to do so with safety.

Whether, in a case of fraud on the part of the commissioners, a court of equity might not, at the instance of the township, set

aside the sale if seasonably applied for, is a question we need not now discuss. But we feel thoroughly convinced that this objection cannot be raised at law by any one after a sale, when there has been an election in fact, and especially not by the purchaser, as he could not possibly be prejudiced by it, the direct tendency and manifest object of the prohibition being to quiet his title.

3. The third plea asserts the invalidity of the sale of the land, because the Judge of the county court did not issue an order of sale. This order, the judge or clerk, as the case may be, is required to issue after the expiration of twenty days, if no one contests the election. It is perfectly obvious, we think, that the judge of the county court has no other power conferred on him, than to determine on the validity of a contested election. The power of selling is exclusively lodged with the voters of the township, and no portion of the law lends any countenance to the supposition that he had the power to thwart their wishes.

Again; if there was no contest, the judge of the county court had not the means of determining whether the election was valid or invalid, because a majority had not voted, or from any other cause. The only evidence in his possession, relating to the matter, would be the certificate of the commissioners, that a majority of the qualified electors had voted for a sale, whilst the evidence of the fact, the ballots, would be in the possession of the commissioners, sealed up. As, therefore, he had no power to prevent a sale of the land, when no one had contested the election, it is inconceivable that his approbation or consent should be necessary to carry into effect the expressed will of the township.

We, therefore, conclude that the order he was required to issue, was a mere notification of the fact that no one contested the election, and consequently, that there was no obstacle to a sale of the land. This being its whole object and design, the commissioners might proceed to sell upon their own knowledge of the fact.

4. The fourth plea, without disputing the regularity of the election and sale, relies, as a defence to the action, upon the omission of the commissioners to return the particulars of the sale to the county court. The act, [Aik. Dig. § 37, required the commissioners, after they had made sale of the land, and had taken the notes of the purchaser, with surety, to enter all the particulars of the sale in a book, to be kept by them for that purpose, setting forth a particular description of the land sold, to whom sold; for

what amount in money, what amount in notes, and who are the principals and securities, and to make a similar return to the judge of the county court, who was required to record it in his office.—The design of this portion of the act, was to preserve an authentic memorial of the whole transaction, for the benefit of the township, in such a permanent form, that it would survive to posterity. All this was to be done after the sale was complete, and how its omission can in any manner affect the purchaser of the land, we are unable to conceive. It was a matter over which he had no control; which did not in any manner relate to or affect his title, and which, whether done or omitted, was alike unimportant to him.

The 5th, 6th and 7th pleas, relate to the certificate of purchase which the commissioners were required to give the purchaser, after the sale was complete, by the execution of his notes for the purchase money, with surety, which when acknowledged in a particular mode, was, after the payment of the purchase money, to constitute a title. These pleas, like the last, are framed upon the supposition, that although the sale of the land was regular, yet, because an informal certificate of purchase was executed by the commissioners, or because they failed to execute any, or omitted to acknowledge it before some judge, that it will retro-act upon the sale, and avoid it, although the purchaser has always retained the possession.

This portion of the law was designed for the exclusive benefit of the purchaser of the lands, and it was his duty to see that it was properly executed. The only defect pointed out in the certificate which was made, is, that it does not state the amount of the purchase money, and this, in our opinion, is altogether immaterial. It is sufficient, as it identifies the land and purchaser, to enable him, if he pays the purchase money, to obtain his patent. If, however, none had been given, or the one given had been wholly defective, the right of the township to the purchase money, would not be in the slightest degree affected by it. The statute points out the mode of obtaining a duplicate certificate, if the original is lost, and the same rule would certainly apply to a defective certificate, or where one had never been given.

The acknowledgment of the certificate of purchase, by the commissioners, before a judicial officer, was doubtless intended as a mode of verifying the official character of the commissioners to

the Executive, and does not exclude any other mode by which that officer might be certified of the fact.

From this examination of the pleas, in connection with the statute, it appears there has been a substantial compliance with its provisions. That there was in fact an election to ascertain whether a sale should be made—that a sale was in fact made to the plaintiff in error, and that upon his executing his notes as the statute requires, he was let into the possession of the land. Such being the fact, and no member of the township having contested the validity of the election, the township is forever estopped from denying his title, and he cannot, therefore, refuse to pay the purchase money.

We have abstained from entering upon the inquiry, whether the purchaser of 16th section lands, could, in any case, allege that the provisions of the law had not been complied with, when the township acquiesced in the sale, and there was no obstacle to his obtaining a title, because, as already observed in this case, the law has been substantially complied with, and the sale is, therefore, binding, both on the township and the purchaser.

The result, thus obtained, renders it unnecessary to examine the argument of the counsel for the plaintiffs in error, so earnestly pressed on the consideration of the court, that the power conferred on the commissioners to sell the land, was a special power, not accompanied with an interest, and could, therefore, only be exercised in the precise mode pointed out by the statute. In truth, however, there seems to be but little analogy between the two cases. This statute is peculiar in its character; it does not merely create a special agent to do a particular act in a particular mode, but contemplates the joint action of the agent and the people of the township, to do the iniatory act on which the whole depends, and concludes the latter from making any objection to the validity of this fundamental part of the proceeding, unless it be interposed within a limited time. It is, however, unnecessary to pursue this subject further.

Let the judgment be affirmed.

SAWYER, ET AL. v. PRICE.

1. Where process is directed to and executed by the coroner, which does not affirm the incompetency of the sheriff to act, its irregularity cannot be objected on error after a judgment by default; but if it was improperly directed, the fact should have been pleaded in abatement.

WRIT of error to the County Court of Benton.

This was an action of assumpsit, at the suit of the defendant in error against the plaintiffs, on a promissory note. The writ is addressed "To any coroner, &c.," without alleging the incompetency of the sheriff to execute it, and was placed in the hands of the coroner, who returned thereon that he had duly executed the same. No appearance was entered for the defendants, and a judgment by default was rendered against them.

BOWDON, for the plaintiffs in error.
WM. B. MARTIN, for the defendant.

COLLIER, C. J.—It is the duty of the coroner to execute all process when the sheriff is a party in interest to any suit in the circuit or county count, and perform all the duties of sheriff, whenever, from any cause, he is incompetent to act as such. [Clay's Dig. 159, § 3.] So, when the office of sheriff becomes vacant, the coroner is required to discharge all the duties which pertain to that office, under all the penalties and liabilities created by law for a violation or neglect of duty. [Clay's Dig. 536, § 10.] Now, although the coroner is invested with the functions of a sheriff in certain cases, it is insisted, that, as the duties of that officer are devolved upon him only occasionally, it is necessary that process addressed to him should state upon its face the cause which makes him legally competent to execute it. It would certainly be more regular where the sheriff is incompetent in the particular case, to state the fact in the writ; yet the omission to do this, will not so far invalidate process, as to induce a revising court to vacate a judgment which has been rendered upon the default of the defendant. In Nabors v. Thomason, [1 Ala. Rep. N. S.

590.] the writ described the defendant as sheriff, &c., but was directed to any sheriff of the State of Alabama, and executed by the coroner. The defendant, in the primary court, moved to quash the writ; his motion was overruled, and he sued a writ of error to this court. It was decided, that the refusal to quash the writ, was not revisable on error; that the defendant should, as the statute directs, have pleaded the irregularity in abatement. [Clay's Dig. 335, § 123.] In Adamson v. Parker, et al. [3 Ala. Rep. 727,] it was said, that process, intended to be executed by the coroner, should, as the act of 1839 prescribes, be directed to the coroner *eo nomine;* yet it might be intended, where process directed to the sheriff was executed by the coroner, that the duties of the former had devolved upon the latter by the sheriffalty becoming vacant. That, in such a contingency, the process would be well executed. [See, also, Jordan v. Bell, 8 Porter's Rep. 53; Ware v. Todd, Adm'r, 1 Ala. Rep. N. S. 199.]

The cases cited all maintain that the form of process, and the irregularity of its execution, can only be taken advantage of by plea in abatement, and apply directly to the case before us.

Without adding any thing further, the judgment of the county court must be affirmed.

FORD, AND OTHERS, v. THE BRANCH OF THE BANK OF THE STATE OF ALABAMA AT DECATUR.

1. When a bank accepts a proposition from the drawer of a bill to take into its possession a stock of goods to be applied *pro rata*, to all his debts, it is not a discharge of his indorsers, although the goods are afterwards taken and sold by the bank, but the sum received is an extinguishment *pro tanto*.
2. The certificate required to be made by the president of a bank, that the debt is really and *bona fide* its property, may be made at the trial or at any time before judgment.

WRIT of error to the Circuit Court of Morgan county.

Motion for judgment by the Bank, against Ford, Wise and

Sherrod, as the several endorsers of a bill of exchange described in the notice.

When the cause was at trial, the Bank, for the purpose of showing the jurisdiction of the court, proposed that the president thereof should make the usual certificate, that the bill of exchange sued on, was a debt, really and *bona fide*, the property of the said Bank. And a certificate was then made and signed by the said president, purporting to be given in open court, of the same date as the day of trial. This certificate is in the present tense, and was objected to by the defendants; but their objection was overruled, and the certificate read for the purpose for which it was offered.

The defendants then proved, that John S. Rhea, who is the drawer of the bill sued on. made a proposition to the Bank, dated the 28th August, 1839, in which he stated that, owing to recent circumstances, he believed it to be his immediate duty to place his means in such a situation, that they could only be taken to pay his own proper and legitimate liabilities; and to that end, he proposed to make a transfer of his stock of groceries and dry goods, amounting to upwards of 20,000 dollars at prime cost, to the Bank, to be applied *pro rata* on his liabilities, with the exception of a certain bill of exchange described in the proposal. Certain debts, embraced in an assignment of real estate, were also excluded by the proposition. It also stated that three debts, of 2,000, 2,500 and 2,500 dollars, due in the names of certain persons therein stated, were intended to be included by it. It then concludes with a statement, that he is willing to make the transfer first, and the terms of sale of the stock to be agreed on by a committee appointed by the board of directors and himself. At the foot of the proposition is a memorandum, that another debt of 3500 dollars, standing in the names of other persons, is his, and is to be taken in the proposition.

This proposition was agreed to on the part of the Bank, and an agent sent for the purpose of taking the goods in charge.

It was also proved, that the dry goods, mentioned in the proposition, had been sold according to stipulation, and that no sale of the groceries had been made as contemplated; and that the Bank had made no effort to sell them in the mode provided for by the agreement, but the same had been sold without consulta-

tion with Rhea, and against his consent, allowing him, however, their estimated value, as deposed to by a witness.

It was also in evidence, that the bill of exchange sued on was one of the demands alluded to, and included in the proposition of Rhea, before stated.

On this state of proof, the defendants requested the court to charge the jury, that if they should believe the contract between Rhea and the Bank, contained in the proposition and acceptance, applied to the debt now sued for, and that the proceeds of the goods were to be applied to the credit of this demand, then that the said contracting between the said Rhea and the Bank was a discharge in law of the defendants; and, in that event, they should find in their favor.

This was refused; and the court instructed the jury, that if such a contract existed, it was no discharge to the defendants, except to the extent of the value of the goods and groceries. The defendant excepted to the refusal to give the charge as asked, and also to that given.

It is now assigned as error:

1. That the record does not declare that the court had jurisdiction of the cause at the time of its commencement.

2. That the certificate of the president could not be made in court, or received after the cause had gone to the jury.

3. That the court erred in giving and refusing the charges as shown by the bill of exceptions.

Cooper, for the plaintiff in error.
Armstrong, *contra.*

GOLDTHWAITE, J.—1. The proposition by Rhea, and its acceptance by the Bank, does not amount to a contract to pay 20,000, or any other specific sum for the goods; and if there was any subsequent agreement between them, ascertaining how the goods and groceries should be sold, it is not brought to our view by the bill of exceptions. The mere acceptance of this proposition, or even the taking of the goods under it, was no discharge to these parties. All that they have a right to require is, that the proceeds of the goods, when sold, should be faithfully applied to the discharge, *pro rata*, of the debts intended to be covered by Rhea's proposition.

The Bank had the right, most certainly, to accept from Rhea any additional security for the debts due by him, and such an acceptance is for the benefit of those who are collaterally, or even directly liable for the same demands.

What might be the effect of a misappropriation of the proceeds, or of a conversion of the goods thus placed in the hands of the Bank, is a question not raised in the court below, and we can perceive no error in refusing to give the charge asked for, or in that given.

2. The objection to the certificate, and to the period when it was made, cannot avail the defendants. The object of requiring a certificate was to prevent suits from being instituted in the name of the Bank, when it had no real interest in the action. It is true, the charter of the Bank provides, that it may move for judgment upon producing to the court the certificate of its president that the debt is really and *bona fide* its property, [Clay's Digest 96, § 8;] but this by no means indicates that the certificate must necessarily be in existence before the motion is made. Let it be supposed that a defective certificate is produced in the first instance, can it be tolerated that the Bank is powerless to avoid the consequences which must flow from that condition of the paper? The construction contended for would prevent the proper officer from correcting his mistakes, unless they were discovered previous to the motion. The constant practice is, we believe, to make out their certificates after notice has been given, and we can perceive no reason why it may not be made at any time before the rendition of the judgment.

Judgment affirmed.

CRAWFORD, ET ALS. v. THE PLANTERS' AND MERCHANTS' BANK OF MOBILE.

1. The act of the Legislature, incorporating the Planters' and Merchants' Bank, is a public statute, and will be noticed judicially by the courts, though not specially pleaded.

2. The act of 13th February, 1843, for the settlement of the affairs of the Planters' and Merchants' Bank continues the charter of the Bank in existence, for the purpose of maintaining suits whether commenced before or after the charter was *declared forfeited.*
3. To authorise the rendition of judgment by motion in favor of the Planters' and Merchants' Bank of Mobile, it is not sufficient to produce to the court the certificate of one assuming to be the President of the Bank, or a commissioner under the act of 1843, that the debt is the property of the bank, but the official character of the persons so assuming to act, must be proved, and the genuineness of their signature. It must appear from the record that such proof was made to the court, although an issue in fact be tried and found for the plaintiff.
4. It is not necessary to prove that the certificate was made at the time it bears date; proof of the genuineness of the signature will be *prima facie* evidence of the contents of the certificate.

ERROR to the Circuit Court of of Mobile.

This suit was commenced by the defendant in error, by a motion against William Crawford, P. T. Harris, H. G. Davis and T. L. Starke, on a note payable to the bank, and was previously before this court at the instance of the present plaintiffs (except Starke, since dead) when the judgment was reversed and the cause remanded. [See the case, 4 Ala. Rep. 315.]

The record now presented to the court, discloses the original notice executed, and a judgment of the court in favor of the plaintiff against Crawford, Harris, Davis and Starke, rendered at the May term, 1841. This judgment, at the instance of the defendants, was set aside and the cause continued, and at the succeeding term, a judgment was again rendered in favor of the plaintiff against all the defendants. From this judgment, the defendants prosecuted a writ of error to this court, by which the judgment was reversed and the cause remanded.

At the spring term, 1843, the following proceedings were had; the plaintiff moved the court to amend a previous judgment of the court, which judgment is in these words:

"Planters' and Merchants' Bank of Mobile v. William Crawford and P. T. Harris. } Motion to set aside judgment rendered at this term in this motion granted, and cause continued,"

so as to read

Planters' and Merchants' Bank of Mobile v. William Crawford, P. T. Harris, *Henry G. Davis and Thomas L. Starke.* } Motion to set aside judgment rendered at this term; in this motion granted, and cause continued.

Which motion was granted by the court, and it being made to appear that T. L. Starke, one of the defendants, was dead, the cause as to him was discontinued. The remaining defendants then pleaded a special plea, the substance of which is, that the plaintiffs ought not further to maintain the action, because the Bank had forfeited its charter by failing to pay its bills and obligations on demand—that the legislature by an act passed 14th February, 1843, declared the charter of the Bank forfeited—that pursuant to the requisitions of the act, a proceeding in the nature of a *quo warranto*, was instituted against the Bank on behalf of the State, and that upon that proceeding, a judgment was rendered by the court, declaring the charter of the Bank forfeited, &c.

To this plea, the plaintiff demurred, and the court sustained the demurrer, and the cause being submitted to a jury, they found the issue for the plaintiff, and assessed his damages to three thousand three hundred and two dollars and sixteen cents, for which judgment was rendered.

From a bill of exceptions taken upon the trial, it appears that the plaintiff having produced a notice executed, also certificates purporting to be executed by F. C. Heard and Daniel M. Riggs, that the note was the property of the Bank, and the note and protest, moved the court for judgment.

The defendants objected that the notice and service was insufficient. 2. That there is no sufficient proof of the capacity of the officers who claim to be President or commissioners of the Bank. 3. That the notice and certificate do not authorise the court to entertain the motion. 4. That the notice, certificates and notes, and protest, did not authorise the motion. The court decided the papers sufficient, and would render judgment, if no plea was tendered, to which the defendant excepted.

The assignments of error are, 1st, that the court erred in amending the judgment *nunc pro tunc*.

2. In sustaining the demurrer to the plea.

3. It does not appear that the note was negotiable or payable to the plaintiff, or to any other Bank.

4. It does not appear that the certificate of the President or Commissioner was presented, and shewn to the court.

5. It does not appear that it was proved that F. C. Heard was President, or D. M. Riggs, Commissioner of the said Bank, or that their signatures were genuine.

6. In taking judgment against H. Davis, when the cause as to him had been continued.

The plaintiff submitted a written argument, in which he made the following points; 1. An amendment may be made at a subsequent term, *nunc pro tunc*, when there is any thing of record to amend by, but after a cause has been discontinued, the party is out of court, and no case, it is believed, can be found, in which it has been held, that such a judgment could reinstate the party, and besides, in this case, there was nothing on the record upon which the amendment could be made.

2. The question presented by the demurrer to the plea, was, whether the bank could proceed and obtain judgment, after its charter had been declared forfeited by the judgment of a competent tribunal. [8 Peters, 281.] If the legislature had given it the power to sue, after the forfeiture of the charter, such privilege should have been relied on in the replication, and not being done, cannot be considered by the court. But, this suit was commenced before the dissolution of the charter, and although the bank may be able to prosecute suits to close its business, there is no power given to *revive* one.

3. To snstain the 3d assignment, he referred to the case reported in 8 Porter, 104.

4. In support of the 4th assignment, he cited 4 Porter, 183; 8 Porter, 102.

5. It has been decided by this court in the case of Roberts, et al. v. The State Bank, that the court would judicially know who was the President of the State Bank, and take notice of his signature, but that was because he was appointed by the legislature, and because of the public interest in the Bank.

The Planters' and Merchants' Bank is a private corporation, it was, therefore, necessary to prove the capacity and signature of F. C. Heard, who claims to be President, and D. M. Riggs, who claims to be Commissioner, and that they were so at the time the certificates were made, as they are without date. [8 Porter, 102.]

6. Although the record states, that Davis appeared, this is a mere entry by the clerk, and is corrected and controlled by the previous proceedings, showing that there had been a discontinuance, and that he had been out of court for several terms.

GIBBONS, *contra.* The record as now presented, shows that there was no discontinuance of the cause as to Starke and Davis, and in point of fact, no amendment was necessary. But if it were, it is justified by the record, which shows what the judgment was which the court set aside.

Both, the act creating the Bank, and the act of 1843, declaring the charter forfeited, are public acts which the court will take judicial notice of, and therefore, need not be pleaded, and by the last act, power is given to it to collect its debts.

That the note was negotiable and payable at the Planters' and Merchants' Bank, is shown by the record.

It appears from the notice and the bill of exceptions, that the certificates of Heard, the former President, and of Riggs, one of the Commissioners, was before the court—and the cause being submitted to the jury upon an issue which is not disclosed by the record, this court cannot know that it was not proved when and by whom the certificates were made, but every presumption will be in favor of the verdict.

If it were true that the cause was discontinued as to Davis, he has waived it by his appearance and plea.

ORMOND, J.—When this cause was before this court at a previous term, [4 Ala. 313] the judgment was reversed and the cause remanded, because it appeared from the record as then presented, that a judgment which was afterwards set aside, was rendered against two of the defendants only, and without any continuance of the motion against the other two, a judgment was subsequently rendered against them also. The record now discloses, that the original judgment was against all four of the defendants, and there can be no doubt of the power of the court to amend the judgment entry, setting aside the first judgment, *nunc pro tunc*, so as to make it correspond with the facts as shown by the record, that the judgment was set aside as to all four of the defendants. Indeed, but for the imperfect condition of the record, from which this court was constrained to infer that the original judgment was against two of the defendants only, the cause would not have been reversed.

We do not consider it necessary to inquire, whether the act of the legislature, [Clay's Dig. 341, § 154,] declaring that "all private acts of assembly may be given in evidence without being spe-

cially pleaded," merely authorises the act to be given in evidence, or whether the proper construction is not that the court will judicially notice them as other acts of the legislature, because we are of opinion that the act chartering the Planters' and Merchants' Bank, is a public statute.

A statute which relates to all the subjects of the Realm, is a public statute. [Bac. Ab. 374.] The charter of this bank secures to the people of the State the right to engage as a partner in the concern, by putting in two-fifths of the capital stock, with a corresponding power in the direction of the bank; it is a matter therefore, which concerns the public generally, and not the private corporators alone, and is therefore clearly a public law. The constitution of the State evidently contemplates that all banks subsequently to be chartered, should, if not wholly, at least to a great extent, be public institutions, in which all the people of the State should have an interest, and over which the legislature should exercise some control. Such being their nature, the acts of the legislature, calling them into existence, concern also the people of the State, and are therefore public acts, which the courts will judicially notice. [See Bank of Utica v. Smedes, 3 Cow. 684.]

If, however, it were a private act, its recognition in the act of 13th February, 1843, which is undoubtedly a public law, authorizes the courts to take judicial notice of it, though not pleaded. [To this point, see Samuel v. Evans, 2 Term, 574.]

It is further insisted, that the act of 1843 continues the charter in existence only for the purpose of commencing new suits, and that all suits then in existence, must be at an end when the charter was declared forfeited. The act of the legislature, declaring the charter of the bank forfeited, and providing the means of judicially ascertaining the fact, declares "that for the purposes of settlement the powers now granted to the said bank for maintaining suits, and the corporate name of the bank shall be continued, and may be employed by the commissioners aforesaid, &c." A subsequent clause authorises suits against the bank. This act then continues the corporation in existence for one purpose, that of closing its affairs; to do which it has the power to maintain suits in its corporate name, and certainly the

reason which induced this enactment, applies with the same force to suits then in existence, as to those to be afterwards commenced. For the purpose of suing and being sued, the corporation has never ceased to exist; as the same act which provides for the resumption by the State of the franchises conferred by the charter, continues it in existence for this purpose; this objection therefore cannot prevail.

But the judgment must be reversed, because it does not appear that the court had jurisdiction. To give the court jurisdiction to render a judgment in this summary mode, it should appear that the certificate of the president of the bank, or by the act of 1843, that of one of the commissioners, was produced, certifying that the debt was the property of the bank. This is indispensable, even when an issue is made up, as was done in this case, and which as in other cases, would ascertain the liability of the defendant for the debt. [Curry v. The Bank of Mobile. 8 Porter, 372.]

In Roberts v. The State Bank, [9 Porter, 317,] we held that the court would judicially take notice who was president of the State Bank, and would judicially know his signature. This decision is placed upon the ground that the president of the State bank is a public officer, elected by the legislature, and the bank the property of the public. The president of this bank is appointed by the stockholders—the commissioners by the stockholders and the governor jointly. We think it cannot be affirmed that either the president of the bank or the commissioners, who are to close its affairs, are public officers—they are the mere agents of private individuals, in which the public has no direct or immediate interest—the State not having taken the stock, which by the charter it was authorized to take in the bank; the reason, therefore, which influenced the decision in Roberts v. The State Bank, fails in this case.

It does not appear from the judgment entry, that any certificate of the ownership of the debt by the bank, was produced, but, from the bill of exceptions it appears, that the certificate of F. C. Heard, as president of the bank, and Daniel M. Riggs, as commissioner, were produced and shown to the court; but

it is not shown in any part of the record, that any proof whatever was made either of the official character of the persons making these certificates, or that their signatures were genuine. This, in our opinion, was necessary, to give the court jurisdiction, and it has always been held, that the record must show that the proof was made which confers the jurisdiction. What would be sufficient evidence of the official character of one assuming to act as president of the bank, or commissioner, we need not now determine, but as the question has been argued, it is proper to say, that it would not be necessary to prove that the certificate was made at the time it bears date; proof of the genuineness of the signature would be *prima facie* evidence of the contents of the certificate.

The remaining assignments of error are covered by the previous decisions of this court, but as the question just examined, is decisive of the case, it is not necessary to consider them.

Let the judgment be reversed, and the cause remanded.

DANIEL, ET AL. LEGAL REPRESENTATIVES OF, &C. V. HOPPER.

1. A garnishee who acknowledges the service of a garnishment regularly issued, and answers the same, cannot object on error that the process was not executed by the sheriff, or proper officer.

WRIT of error to the County Court of Montgomery.

On the first of February, 1843, oath was duly made, that the plaintiffs in error had recovered a judgment in the orphans' court of Montgomery, against Anderson Thomas, for the sum of twenty-eight hundred and seventy-one 60-100 dollars, besides costs; that the defendant in the judgment had no property in his possession to satisfy the same; and that affiant had just reason to believe that the defendant in error is indebted to him, &c. A garnishment was immediately issued in pursuance of the affida-

vit, and served on the garnishee, as shown by the following endorsement, viz:

"Service accepted, this 1st February, 1843.

Jos. D. Hopper."

The garnishee appeared and answered to the garnishment; and at the term of the county court next succeeding his appearance, moved "to quash and set aside the service of the garnishment in this cause, because he says the same was accepted, and not executed by the sheriff." This motion was granted, and a judgment entered accordingly.

T. Williams, for the plaintiff in error, cited Clay's Dig. 259; 3 Stewt. Rep. 192; id. 480; 1 Stewt. & P. Rep. 298; 6 Porter's Rep. 365.

Elmore, for the defendant, relied on Rapelye & Co. v. Ware, [1 Stewt. Rep. 33.]

COLLIER, C. J.—The act of 1818, after providing that a garnishment may be issued where the plaintiff or other credible person shall make affidavit that the defendant has no property in his possession, &c., authorizes the court, to cause the person supposed to be indebted, &c., to be summoned to appear forthwith before such court, as a garnishee, &c. [Clay's Dig. 259, sec, 2.] By summoning the garnishee, is meant nothing more than to give him notice of the contents of the process issued against him, that he may appear at the time it prescribes. True, the garnishment, like all other process, should be served by the proper executive officer; yet, as it is intended as a mere notice to the garnishee, it is entirely competent for him to dispense with this mode of service, by his written acknowledgement that he has received, or dispenses with service. This has been done in the present case, as the motion of the garnishee admits. Not only has the defendant in error admitted that he was served with the process, but he has submitted his answer in writing; and this, at least, should, upon principles, founded both in analogy and sound reasoning, foreclose all objection as to the manner in which he was brought before the court. In other cases, the acceptance of service of a writ, or an actual appearance without it, has always been regarded by us as equivalent to its execution

by a competent legal officer. In fact, it would be trifling with the dignity which should distinguish judicial proceedings, to permit one who has come into court voluntarily, or by coercion, and submitted to its action, to object that he had not been regularly brought in.

The judgment of the county court is sought to be sustained by the case of Lawrence, Rapelye & Co. v. Ware, [1 Stewt. Rep. 33.] In that case, an original attachment was issued at the suit of the defendant in error against the plaintiffs, in September, 1823, and a summons for J. D. & Co. was served on their agent. In the fall of 1825, two years afterwards, J. D. answered on oath before a justice of the peace, and his answer was brought into court, admitting that he had notes of the defendants in his hands for a certain sum, and consenting that a judgment might be rendered against him therefor. The court were of opinion that the affidavit was voluntary, and not in obedience to any process; and held that it was important the examination of the garnishee should be in open court, in order to protect the rights of absent defendants, and to prevent the abuses to which this mode of instituting an action is liable. The mere statement of this case will, at once show, that it is unlike the one at bar. There, the garnishee's answer was made out of court; here, he appeared in obedience to process, and submitted to answer in open court. Neither was the service of the garnishment made or accepted by the garnishee. And, besides, the defendants in attachment were themselves complaining of the irregularity. Whether this state of facts warranted the judgment of the court in that case, it is not necessary to inquire. They are quite sufficient to distinguish the cases from each other. [Smith v. Chapman & Brother, 6 Porter's Rep. 369, 70.]

It results from what has been said, that the judgment of the county court is reversed, and the cause remanded.

ARNOLD v. SHEPPARD.

1. The statute empowering courts of equity to proceed against absent defendants, invests those courts with jurisdiction over bills for discovery, in aid of the prosecution, or defence of a suit pending in any of the courts of law of this State, or with respect to property within it.
2. It is not necessary in suits against absent defendants to prove the allegations of the bill, when it is taken *pro confesso.* The enactment which requires proof, only applies to suits against resident defendants.
3. When the ground for equitable relief against an absent defendant is, that the note prosecuted by him in the court of law has been paid, and the fact of payment is solely within his knowledge, the court may decree relief upon the allegations of the bill, after a decree *pro confesso.*

WRIT of error to the Court of Chancery of the 3d District of the Southern Division.

The bill is by Arnold against Sheppard, who is shown to be a resident of Texas. The service was perfected by publication in a newspaper, and by notice upon the courthouse door, in the manner required by statute.

The bill asserts, that Sheppard has commenced a suit against Arnold in the circuit court of Lowndes county, upon a note which was previously fully paid and satisfied.

The payment is alleged to have been made to the defendant at a time and place stated in the bill, and received by him under a promise that the note should be destroyed.

The prayer is for a perpetual injunction of the suit at law, and that the note may be delivered up to be cancelled, as well as for general relief.

No appearance was entered for the defendant, and on proof of publication, a decree *pro confesso* was allowed by the register at rules. Evidence on the part of the complainant was taken in the cause, but nothing is established by it.

The complainant moved the chancellor to continue the cause, and hold up the injunction until the defendant should file an answer; but the chancellor had doubts of the correctness of that course, and finally dismissed the bill with costs; considering it as one for discovery in aid of the defence at law, and not for relief,

The dismissing of the bill is now assigned as error.

J. P. Saffold, for the plaintiff in error, insisted—

1. That he was entitled to a decree for a perpetual injunction upon the default of the defendant to answer. [Miller v. McCan, 7 Paige, 451; Eden 253; Harrison Prac. 551; Nicholas v. Jones, 3 A. K. Marshall, 387; Williams v. Corwin, Hopk. 477; Douglass v. Evans, 1 Tenn. 83; Pegg v. Davis, 2 Blackf. 281; Baltzell v. Hall, 1 Litt. 98; Robinson v. Townsend, 3 Gill. & J. 413; Peto v. Attor. Gen. 1 Young & J. 509; Landon v. Ready, 1 Sim. & Stu. 44; Turpin v. Jefferson, 4 H. & M. 483; Dunlap v. McIlvay, 3 Litt. 269; 2 Bibb, 445; 3 Bibb, 303.]

2. The injunction should, at all events, have been continued until an answer was put in, as the complainant is entitled to a discovery, however he may be as to the relief. [Story's Eq. 419.]

3. But if the injunction cannot be continued, then the complainant is entitled to a decree authorizing him to read the *pro confesso* on the trial at law. [Sprigg v. Jarrett, 1 A. K. Marshall, 336; 2 Story Eq. 691.]

4. The defendant cannot, on error, complain of the want of jurisdiction not urged in the court below, or to the regularity of proceedings there. [Farley v. Farley, 1 McCord Ch. 513; McDonald v. Crocket, 2 ib. 135; Bayle v. Fitzhugh, 2 Wash. 213; Barnes v. Lee, 1 Bibb, 527; 2 Sumner, 546.]

Edwards, *contra*, insisted, that it was a mistake to consider this as a bill for discovery merely. It stands on the same footing as any other bill for relief, and must be proved upon a decree *pro confesso*. [Clay's Digest 351, § 39—354, § 58.] The bill, not being framed as one for discovery, it was proper to dismiss it, as the relief could not be granted even if the facts were proved.

GOLDTHWAITE, J.—1. We are satisfied, that the decree of the chancellor dismissing this bill, ought not to be sustained. The act of 1805, entitled an act empowering courts of equity to proceed against absent defendants, [Clay's Digest, 352, § 44 to 49,] was intended to invest those courts with full jurisdiction of such defendants, and is as effectual in cases where the object of

the bill is discovery merely, to aid in the prosecution or defence of a suit pending in any of the courts of law of the State, as it would be in cases where relief was sought by a citizen of the State, or with respect to property within it. We state the purpose of the act in this limited manner, because a doubt may exist whether a non-resident complainant, seeking relief with respect to property not within the jurisdiction, would be entitled to claim the benefit of the provisions of this act.

2. The 1st section of this act expressly provides that, if the defendant does not appear after publication is made, in the manner provided for, that the plaintiff's bill may be taken *pro confesso*, and a decree made thereon. The 6th section of the act of 1823, entitled an act to regulate proceedings in chancery suits, it is true, provides generally, that before a decree is pronounced on a bill taken *pro confesso*, the court shall be satisfied, by sufficient evidence, of the justice of the complainant's claim or demand; but we do not think this was intended to affect the particular act then in force with respect to absent defendants, because it is evident that, in such cases, the benefit of a discovery would, in most cases, be evaded, if such a construction was given. The object of the latter act seems merely to have been to provide a new rule midway between the ancient chancery practice, which gave no benefit whatever to a complainant, from the neglect of the defendant to answer, until the latter had stood out all proceedings for the contempt in wilfully refusing to answer; and the modern, which authorized a final decree, immediately upon taking the bill *pro confesso*. Under it, the court requires proof, though a less degree will warrant a decree. [Levert v. Redwood, 9 Porter, 79; Wilkins v. Wilkins, 4 Porter, 245.]

We apprehend it was not intended to take away the power of a court of equity to render a decree where the defendant wilfully stands out all the means which the law gives to compel an answer. But in cases against absent defendants, there are no means by which an answer can be compelled. The process of attachment in all cases, and that of sequestration in most, would alike be ineffectual. It was in view of this, as it seems highly probable, that the first statute provided that a decree should be made upon the bill after taking it *pro confesso*. And this idea is greatly strengthened by the cautious manner in which the rights

of absent defendants are regarded by the act. The subsequent act of 1841, [Clay's Digest, 354, § 58,] modifies the act of 1823, and allows a decree to be made without proof whenever there is a personal service on the defendant, but excepts infants, *femes covert*, idiots and lunatics from its operation; but as it has no reference to the special act relating to absent defendants, has no effect on its construction.

3. Having ascertained that the powers of a court of equity, under the act of 1805, are sufficient to give relief to a complainant against an absent defendant, it remains to consider whether a proper case is made by the bill; and if so, what ought to be the decree.

The English court of chancery seems always to have held that it had jurisdiction to compel the delivery and cancellation of policies of insurance, bills and notes obtained by fraud, although that defence is equally available at law. [De Costa v. Scandret, 2 P. Wms. 170; Law v. Law, 3 ib. 391; Whittingham v. Thornburgh, 2 Vern. 206; Goddart v. Garrett, ib. 269; Menshaw v. Jordan, 3 Bro. C. 18 n.; Newman v. Milner, 2 Vesey, jr., 483; Jackman v. Mitchell, 13 Vesey, 581.] In Bromley v. Hillard, [7 Vesey, 3,] and Jarvis v. White, [ib. 413,] the question was raised, whether a court of chancery, in such a case, could decree without a trial first had at law, and decided affirmatively. The same conclusion is arrived at by chancellor Kent in Hamilton v. Cummings, [1 John. Ch. 517,] though he thought such relief was discretionary, and that applications to chancery for relief ought not to be encouraged. In Jarvis v. White and Kemp v. Pryor, [7 Vesey, 249,] Lord Eldon notices that the common practice in the exchequer is not to press such bills after a discovery is obtained; but denies that there is any reason to preclude a court of chancery from determining the case upon the evidence the same as any other of ordinary jurisdiction. Whatever may be the respect due to these decisions, it is certain they do not go the length of asserting that when a defence arises to a bill or note, which is subsequent to its making, this can be asserted in a court of equity, when there is no impediment to asserting it in a court of law. Doubtless, there are cases where an injury might be of such a nature, by withholding the evidence of the demand, that a court would be justified in taking jurisdiction for that cause; or even to restrain the negotiation of paper which should be cancelled; but

the effect of recognizing the doctrine, that a party was entitled to have a note delivered up by the coercion of a court of equity, when no action ought to be maintained on it, might bring any contested case into chancery for decision.

There is a clear distinction, however, between the power to exercise jurisdiction generally, and that which is incidental upon a discovery. It has been claimed for courts of equity, that they have jurisdiction to grant relief in all cases where the discovery sought for is obtained. [1 Story's Equity, 87, and cases there cited.] Without now enlarging upon an examination into the precise limits of this species of jurisdiction, we think it is clear that a court may, in such a case, proceed to decree the proper relief, unless the jurisdiction is declined by plea, answer or demurrer. In Newman v. Milner, [2 Vesey, jr., 483,] Lord Eldon asks, what is there for the court at law to try in such a case? There is certainly no good reason for withholding the proper relief, when the discovery is made, and the jurisdiction not declined. In cases against absent defendants, the effect of declining to answer is virtually the same as a confession of the allegations of the bill, and the same decree should be made in the one case as the other.

It is unnecessary to determine what is the proper practice when the bill is for discovery only, and when no decree could be made by the court, even if the discovery was made.

Our conclusion is, that this decree must be reversed, and the cause remanded for the proper decree to be rendered, if the party will enter into the security required by the statute.

WHITAKER, ET ALS. v. DEGRAFFENREID.

1. Where the bill in a chancery suit is so uncertain in its allegations that it cannot be ascertained from the bill who are the necessary parties to the suit, it will be bad on general demurrer.
2. Parties having no interest in the matter in controversy cannot be joined with others that have; therefore, where sureties joined as complainants with their

principal in a bill to coerce payment of the debt for which they were bound from a third person, the bill should be dismissed.

ERROR to the Chancery Court of Franklin.

The bill was filed by the plaintiffs in error, and alleges that William H. Whitaker purchased a part of a 16th section from the school commissioners, took from them a title, and gave them a deed of trust for the purchase money, which was secured by four notes, on which B. M. Bradford, G. W. Foster and Jos. Trotter, were sureties. That Whitaker afterwards sold the land to one Radford McCargo, who agreed with Whitaker to pay the debt due the school commissioners. That afterwards, McCargo sold the land to the defendant in error, who bound himself by a stipulation in writing, to extinguish the debt aforesaid. That the stipulation was handed to Whitaker, who, on his leaving the county, left it with a person who died, and that DeGraffenreid afterwards possessed himself of it, and refuses to deliver it up, and that in consequence thereof, they are unable to state whether the obligation entered into by DeGraffenreid, was in favor of Whitaker or McCargo. That DeGraffenreid wholly failed to discharge the notes due the 16th section, in consequence of which the land was sold under the trust deed, but that a considerable part remains unpaid. That Whitaker is insolvent, and his sureties will have to pay the debt.

The bill prays a discovery from DeGraffenreid of the suppressed obligation, and for general relief, &c.

To this bill the defendant demurred, and the chancellor sustained the demurrer, and dismissed the bill, from which decree this writ is prosecuted.

SILAS PARSONS, for the plaintiff in error, cited 7 Paige, 257; 2 Yerger, 346; 1 Story's Equity, 479; Story's Eq. Pl. 64, 74, 103, 104, 105; 1 Strange, 95; 1 J. C. R. 566; 2 id. 296.

PECK and CLARKE, *contra.*

ORMOND, J.—There is clearly a misjoinder of complainants in this case, which is fatal on general demurrer. [Bowie v. Minter, 2 Ala. Rep. 406.] The three persons who were sureties

for Whitaker, have no interest in the matter, in controversy.—Until they pay the debt of their principal, they can maintain no action in their own names, based upon their liability to pay the debt, unless it be a bill in chancery to compel the creditor to sue. They were, therefore, improperly joined in a suit with their principal, unless it was shown that the promise of DeGraffenreid, was made to them jointly with their principal. The bill is also bad for uncertainty; it does not show whether the undertaking of DeGraffenreid was made to Whitaker or McCargo. If to the former, then the latter has not such a legal interest in it as would justify his being made a party to the suit; and if to the latter, then for the same reason, the former was improperly joined. If an exception could be made in a case where the fact was only known to the defendant, and the knowledge of it was fraudulently withheld by him, this is not such a case as we must presume the fact to be known to the persons interested.

Certainty, in the allegations of the bill, is essential in equity pleadings. In this case, the uncertainty is so great that it is impossible to say, from the allegations of the bill, who are the necessary parties to the suit. On this head, see the authorities collected by Mr Justice Story, in his Equity Pleading, 212.

Let the decree of the chancellor be affirmed.

BARTLETT & WARING v. DOE EX DEM. GAYLE & PHILLIPS.

1. Where an injunction is awarded at the instance of a *stranger*, to restrain the collection of a judgment by the sale of property levied on, and a bond executed with surety, the lien of the judgment is not thereby impaired; and upon the dissolution of the injunction, the plaintiff's execution will be entitled to priority, as against other creditors or purchasers, whose liens attached while the injunction was in force.

WRIT of error to the Circuit Court of Mobile.

This was an action of ejectment at the suit of the defendants in error, in which the plaintiffs made themselves parties, and entered into the usual consent rule. The cause was submitted to the court upon a case agreed, with the consent that judgment be entered as on verdict; and if rendered for the plaintiff, that "the rent be assessed at six hundred dollars *per annum*."

The facts stated for the judgment of the court, are substantially as follows, viz: The premises in question were purchased by McRae & Lang, with partnership funds, and upon joint account. After the death of Lang, McRae executed a note in their joint names, by C. C. McRae, survivor, for $3,800, dated the 7th of March, 1838, and payable one day after date, to A. H. Ryland. The consideration of this note was money collected by Messrs McRae & Lang, for the payee, in the year 1836, and which had never been paid over. In order to secure the payment of the note, McRae executed a deed of trust with a power of sale on the premises, bearing date the 6th December, 1838. A sale took place under this deed, at which the plaintiffs' lessors became the purchasers, and received a conveyance from the trustee on the 4th May, 1840.

On the 21st May, 1838, the defendants below recovered a judgment against McRae as surviving partner, for the sum of $7,435 21, being a debt due by McRae & Lang, in the lifetime of the latter. An execution issued on this judgment, bearing teste the 6th June, 1838, which on the 1st of August thereafter, was levied on the land in controversy; on the 9th of the same month, at the instance of Catherine Lang, adm'rx of the deceased partner, an injunction was awarded to restrain the defendants from enforcing the collection of that execution by a sale of the property levied on; and a bond executed, with surety. The injunction was dissolved on the 7th January, 1839, and on the 4th of March, the land was regularly sold to the defendants by the sheriff of Mobile, for the sum of $9,860, who made them a deed therefor, which was duly recorded. The bill upon which the injunction was granted, was continued as an original, up to the fall term of the chancery court, holden for Mobile in the year 1840. On these facts, a judgment was rendered in favor of the plaintiffs.

G. N. Stewart and J. A. Campbell, for the plaintiffs in error, made the following points: 1. The injunction granted upon the

bill of Mrs. Lang, did not enjoin the judgment of Bartlett & Waring against McRae, or in any manner impair its validity or power. [9 Porter's Rep. 376; 4 Ala. Rep. N. S. 20; 3 B. Monr. Rep. 191.]

2. The suspension of an execution by operation of law, does not destroy its lien. [2 Stew't & P. Rep. 390; 3 Porter's Rep. 138; 8 Leigh's Rep. 416; 4 Peters' Rep. 124.]

P. Phillips, for the defendants. The lien of the judgment in favor of Bartlett & Waring, as it respects the premises in question, was destroyed by the injunction granted upon the application of Mrs. Lang; for it is an acknowledged principle, that the lien of a judgment depends upon the right to sue out an execution. [1 Paige's Ch. Rep. 558; 2 Call's Rep. 125; 4 H. & Munf. 57; 13 Johns. Rep. 553; 1 Peters' Rep. 443; 13 id. 474; 16 id. 108.]

A judgment loses its lien after a year and a day from its rendition. [14 Mass. Rep. 386; 15 Johns. Rep. 169; 16 id. 537; 8 Serg't & R. Rep. 376; 18. Wend. Rep. 526.] So, where the debtor executes a bond with surety, as the condition on which an injunction is granted, the bond is a substitute for the lien of the judgment. [1 Martin &. Y. Rep. 373; 4 Bibb's Rep. 263; 4 How. Rep. (Miss.) 180; 1 Wash. Rep. 120; 2 Hayw. Rep. 81; 6 Munf. Rep. 184; 3 Yerger Rep. 84.]

COLLIER, C. J.—The only question necessary to be considered in this case, is, whether the order for an injunction made upon the bill of Mrs Lang, and the execution of a bond by her with sureties, suspended the lien of the judgment in favor of the plaintiffs below against McRae, as the surviving partner of Lang, until the injunction was dissolved? It has been repeatedly held, as well by ourselves as our predecessors, that the effect of an injunction regularly issued upon the execution of a bond with surety, by the defendant in the judgment, is to destroy the lien of the execution injoined. [Mansony and Hurtell v. The U. S. Bank and its assignees, 4 Ala. Rep. 750, and cases there cited.] So, where an execution is superseded, by giving bond with surety upon suing out a writ of error, the lien of the judgment is discharged. [Campbell, use, &c. v. Spence, et al. 4 Ala. Rep. 543.]—But the lien is not impaired by the execution of a replevy bond, forthcoming bond, or a bond to try the right of property, id; [Mills

v. Williams, et al. 2 Stew't & P. Rep. 390; McRae and Augustin v. McLean, 3 Porter's Rep. 138.]

It is insisted for the plaintiff in error, that a judgment only operates a lien upon the lands of the party against whom it is recovered so long as it may be enforced by execution; and that the injunction restraining all proceedings as to the premises in question, relieved them from the lien of the judgment. [See Mansony and Hurtell v. The U. S. Bank, &c. *ut supra*; Wood v. Gary, 5 Ala. Rep. 43.] The principle upon which an injunction has been held to discharge the lien of a judgment or execution, is, that the bond which the complainant executes, furnishes the plaintiff with another security for his debt; and upon which he may, after the injunction is dissolved, have an execution. [Conway v. Jett, 1 Martin & Y. Rep. 373; Smith, et al. v. Everly, et al. 4 How. Rep. 178; Clay's Dig. 357, § 79.] Now the condition of the bond in the case before us, is, that the complainant "shall pay and satisfy all damages which the said defendants may sustain by the wrongful suing out of the said injunction." It is perfectly clear that the undertaking of the obligors does not oblige them to pay and satisfy the judgment, if the bill for an injunction shall be unsuccessfully prosecuted; it merely binds them to make good any loss which the obligees sustained by reason of the groundless exhibition of the bill. Thus, if the property depreciated in value during the period that the injunction continued in force, by the burning of houses, &c. so that the plaintiff could not obtain satisfaction of his execution; in such case, the plaintiffs in the judgment may resort to their remedy upon the bond. But if the property continues of value sufficient to satisfy the judgment, the plaintiffs have sustained no damage for which they can charge the sureties in the bond; as for the delay in its collection, the law regards the interest as an equivalent for that.

Upon this point, the case of Hanley v. Wallace, [3 B. Monr. Rep. 184,] is a direct authority for the plaintiffs in error. The court there say, where a judgment is injoined at the suit of a stranger to it, and an injunction bond given by him to restrain the sale of a particular article of property; *whatever may be the condition of the bond*, it operates in equity, only as a security to the obligee for the injury that may accrue, not for the amount of the debt. Here the law is laid down in stronger terms than the condition of the bond in the present case requires.

It may also be remarked that no execution can be issued upon the bond; 1. Because it does not injoin the judgment, but only proceedings thereon, as it respects the premises in controversy. 2. Because the defendant at law is not the complainant in equity.

From this view it results, that the lien of the judgment is paramount to that of the deed of trust: The consequence is, that the decision of the circuit court upon the facts is erroneous—its judgment is, therefore, reversed, and the cause remanded, if the defendant in error desires it.

P. H. & H. W. PROUT v BRANCH BANK AT DECATUR.

1. Where a further day of payment is given, by deed, to the principal debtor, he being the maker of several promissory notes, and the drawer of several bills of exchange, but a reservation is made in the deed that nothing contained in it shall bar or affect the right of the creditor to sue on any of the notes or bills at the request of any of the sureties; such a contract does not discharge the indorsers.
2. Where the principal debtor, by deed, assigns property to a trustee for the payment of bills and notes upon which others are subsequent in liability, contracting thereby for delay, with a reservation by the creditor of the right to sue at the request of any surety, (in which event the deed was not to operate as a security for the debt thus sued,) and containing a condition that the debtor might sell the property, or remain in possession of it until the expiration of the time contracted for, is no discharge of the parties subsequent in liability, even if it is conceded that the deed, by reason of these stipulations, would be void as to a creditor.

Writ of error to the Circuit Court of Morgan county.

Motion by the Bank for judgment against the Prouts, as the endorsers of a bill of exchange drawn by Rhea & Ross, upon and accepted by Gamble, Murrah & Co., dated 12th September, 1838, at 8 months. The bill is payable to Isaac H. Walker, who endorsed it to the defendants, who endorsed it to Toby, Connor & Co. who endorsed it to Reese & Co. who endorsed it to the Bank.

The defendants pleaded in bar that the plaintiffs gave day of payment after the maturity of the bill to the drawers. The de-

lay is alleged to have been given by a certain deed set out in the plea, executed by John S. Rhea, one of the firm of Rhea & Ross. This deed recites the indebtedness of Rhea, as one of the firm of John S. Rhea & Co., and Rhea & Ross, by several bills of exchange and promissory notes, endorsed by various individuals, (among which is the bill now sued on,) and that he is desirous of securing the same; and for that consideration, and the sum of one dollar, paid him by Green P. Rice, he conveys to the latter several tracts of land, a number of slaves, and 5-8 of the steamboat Asia upon trust, nevertheless, that the Bank should allow the said Rhea to have the debts therein named divided into four equal annual instalments from the date of the deed, and should only require of him annually the instalment that should then fall due, with interest on the whole debt; and should permit the said Rhea to sell or dispose of any of the said property; and should further permit him to keep and retain possession of all the property, until default be made in the payment of the said instalments, or any one of them, as they fall due; and to take the rents and profits to his own use and benefit. Provided that nothing contained in the deed should bar or affect the right of the Bank to sue upon any of the bills or notes described at the request of any of the sureties, to any of those mentioned or intended to be secured; and that such suit on such bill or note should not destroy the terms of the deed as to any or all the bills or notes not sued upon. It provided, that upon default in the payment of any one of the instalments, it should be the duty of the trustee, upon giving one month's notice, by advertisement in the nearest newspaper, to proceed and sell so much of the property as would satisfy the default and the expenses. It also provided, that if there should be no default, the deed should be void.

The plaintiffs demurred to this plea, and the court sustained the demurrer.

This is the only error assigned.

W. Cooper & Nooe, for the plaintiffs in error, cited Bailey on Bills, 359; Comegys v. Cox, 1 Stewart, 262; Ellis v. Bibb, 2 Stewart, 62; Comegys v. Booth, 3 Stewart, 14; Everett v. United States, 6 Porter, 166, to show the extent of the general rule, that a surety is discharged by giving day to the principal. King v. Baldwin, 2 J. C. R. 559, and Gould v. Robson, 8 East, 578, to

show that it is the *new contract* made with the principal which discharges the security, and that the old one cannot, by agreement, be retained as a collateral security.

The proviso in this deed does not cover the case of the endorser paying the bill, and then suing in his own name. The event only is provided for, of the bank suing, *if requested* so to do by an endorser. [U. States v. Hatch, 6 Peters, 258; McLemore v. Powell, 12 Wheat. 554; Boultbee v. Stubbs, 18 Vesey, 20; Wood v. Jefferson Bank, 9 Cowen, 195; Theob. on P. & S. 144, 77, 128; Chitty on Bills, 442.]

The deed itself is a fraud upon the endorsers and other creditors, as it is *in terrorum* as to the first, and covers the property as to the last, for a space of years.

Armstrong, *contra.* The obvious intention of the parties to the deed, is, that the remedy against the endorsers was not to be prejudiced by the arrangement then made; and the stipulations must be construed with reference to the intention of the parties. [Chitty on Bills, 441 to 456; 1 Johns. Ch. Rep. 289; Bailey v. Baldwin, 7 Wend. 289.]

GOLDTHWAITE, J.—1. It must be conceded, that here there has been a valid contract between the Bank and one of the drawers of the bill, for indulgence; and, therefore, the principal question is, whether the reservation in the deed is effectual, to continue in force the right of the bank to enforce payment from these defendants as indorsers, after the expiration of the time for which indulgence was stipulated. We say *after* the time, because no question arises whether the suit could be brought during the period for which delay was agreed to be given. To determine this question, it is necessary to ascertain what the parties contracting meant and intended by this reservation; for it cannot at this day be doubted, that contracts are so to be construed as to give effect, if it legally can be done, to the intention of the parties. It is said that if a deed can operate two ways, one consistent with the intention, and the other repugnant to it, courts will ever be astute so to construe it as to give effect to the intent.—[Earl of Clanrickard's case, Hob. 277; Sally v. Forbes, 2 B. & B. 38.] The intention is made apparent upon the face of this deed, that time shall be given to the drawer, unless some party

subsequent in liability on the bills or notes, should see proper to direct a suit to be instituted.

It is said, however, that the deed does not contemplate that one standing in this relation to the bill, might defeat the indulgence by paying it, and suing on it in his own name, or for the money paid. The cases of Gould v. Robson, [8 East, 576,] and Boultbee v. Stubbs, [18 Vesey, 20,] have been much relied on to show, that reservations of a right, of this nature, are construed strictly. The first was the case of the holder of a bill after it became due, receiving part payment from the acceptor, and taking from him another bill, payable at a future short date for the remainder; but agreeing to keep the original bill in the interim, as a security. It was held the indorser was discharged. The other was the case of a creditor giving time to the principal, in a bond for a part of the debt, but expressly, without prejudice to any security which the creditor then held. An injunction was allowed upon a suit by the creditor against a surety to the bond. In the case where the original bill was retained as a security, the court considered the implied agreement to be that it should not be sued on until after the dishonor of the new one. In the case of the bond, the lord chancellor conceded that a reservation of the right against a surety could be made, provided the surety's remedy against his principal was not impaired: how, after this concession, the injunction was allowed, the report does not explain. It seems to us that neither of these cases warrant the principle contended for here, because it is perfectly clear upon this deed that the giving of time was entirely dependent upon the action of the parties who were subsequent in liability upon the notes or bills. If they required suit to be brought the bank was at liberty to bring it, and it is not too much to say for the effect of such a reservation, that it had no tendency whatever to impair or defeat the right or remedy of any surety. The doctrine of our court as well as of others, is, that there is no obligation upon the creditor, of active diligence; all that is required of him is, that he shall make no contract to suspend his remedy, to the prejudice of those who are secondarily liable. [Inge v. Branch Bank of

Mobile, 8 Porter, 108; Wright v. Simpson, 6 Vesey, 734: Trust Navigation Co. v. Harley, 10 East, 40; American Cases to the same effect, cited in Chitty on Bills, ed. 1836, 442, n. 1.]

In the case of Boultbee v. Stubbs, before cited, Lord Eldon seems to have been impressed with the idea that stipulations of this kind were, in many cases, so absurd, that the intention should be seen plainly to give it effect; but even in England it has never been held, so far as we can ascertain that such a reservation is not effectual when made. Indeed, it has been repeatedly held, both before and since that decision, that the right against a surety or joint debtor, was not gone when there was such a reservation. [Sally v. Forbes, 2 B. & B. 38, *Ex parte* Carstairs, Buck. 560; *Ex parte* Clendening, ib. 517.] To the same effect is Bailey v. Baldwin, [7 Wend. 289,] a case very similar in the terms of the reservation, to the one we are now considering.

We conclude, therefore, that the reservation in the deed was effectual to continue the right of action against the defendants, after the expiration of the term given for delay to the drawer; and therefore, that they are not discharged by reason of the contract between the bank and Rhea.

2. The question, whether the deed itself is void, in consequence of the stipulation that such sureties as may require suit to be brought, should not be benefitted by it, and that Rhea should remain in possession, with power to sell, until default, does not arise here, inasmuch as those defendants could, by becoming judgment creditors of Rhea, have tested the legal sufficiency of the deed by a levy. Even if the deed is conceded to be void, by reason of these stipulations, as against a creditor of Rhea, it is no discharge to the parties to the notes or bills.

Upon the whole, we think there is no error in the judgment, and it is therefore affirmed.

HILL, ET ALS, v. FITZPATRICK, GOV., USE, &C.

1. In an action against a sheriff and sureties, on his bond, it is not necessary to allege a demand *specially*. The case of McBroom v. The Governor, [6 Porter 32,] *contra*, overruled.
2. The plaintiff may, on the trial, abandon such of the assignments of breaches as he thinks proper, even after a demurrer to them has been overruled.
3. In a suit against the sheriff and his sureties on his bond, the latter cannot insist that they are not liable upon the bond described in the declaration, but upon one executed subsequently, unless they put the fact in issue by plea.
4. In such an action it is not necessary to produce the judgment on which the execution issued, its recital in the execution is *prima facie* evidence of the fact against the sheriff.
5. To let in secondary evidence of the contents of an execution, it is not necessary that a search should be made for it in the clerk's office, by the clerk; a search by any one who has access to the office will be sufficient, especially in a case where slight evidence of the loss of the paper would be sufficient.
6. An *alias pluries fi. fa.* is sufficiently described as an "execution."
7. The recital in an execution that it has been issued on a judgment affirmed by the Supreme court, and that *ten per cent. damages* is to be made thereon, is evidence against the sheriff of the fact, without producing the record of the affirmed judgment.
8. A sheriff who has collected money upon an execution, cannot dispute the right of the plaintiff to the money, upon the ground that the judgment was satisfied by a recovery and satisfaction in another case, founded upon the same cause of action.
9. A deputy sheriff invested by his principal with the power to collect money under execution, and actually collecting it, cannot refuse to pay it over without putting his principal in default; a demand therefore, of him, is, in law, a demand of the principal. It will not vary the case that the sheriff's office has been declared vacant as he has the power to finish the business which he had begun.

ERROR to the Circuit Court of Wilcox.

This was an action by the defendant in error, upon the official bond of Hill, the sheriff, and his sureties.

The declaration sets out the bond and its condition, and assigns seven breaches.

1. That Hill (the sheriff) after the execution of his bond, and during the continuance of, and whilst in the discharge of the duties of his office, did as such sheriff, collect the sum of $1,605 51,

upon an execution which issued from the clerk's office of Wilcox circuit court, on the 25th Nov. 1839, and returnable to the next spring term of said court, in favor of one Robert L. Jamison, for the sum of $1,438 08 damages, and $143 80 damages adjudged by the supreme court for delay, and $23 62 1-2 costs against Harris S. Evans, Thomas E. Ellis, John A. Evans and Abel E. Evans. But the said Hill, sheriff, as aforesaid, though often requested so to do, has not paid, &c. &c.

The second, third, fourth and fifth assignments of breaches, were abandoned at the trial.

The 6th is in the usual form, for a failure to return the execution.

The 7th breach, after alledging the receipt of the execution by the sheriff as in the first breach, proceeds, that the said Hill, as such sheriff, did collect the moneys therein mentioned, and ought to have paid the same over on demand, to the said Robert L. Jamison. But the said Hill, although often requested so to do, wholly neglected and refused to pay over on demand, to said Jamison, the said last mentioned sum of money, or any part thereof, and still neglects and refuses so to do, to wit, &c.

By reason whereof, &c. &c.

The defendants demurred to all the assignments of breaches except the sixth, to which they pleaded payment. The court overruled the demurrer, but permitted the plaintiff to strike out the second, third, fourth and fifth assignments of breaches.

From a bill of exceptions taken at the trial, it appears that the defendant objected to the reading by the plaintiff of the bond declared on, because another bond was subsequently made by Hill, approved and filed, and proposed to prove that the default of the sheriff, if any, was after the execution of the last bond, but the court overruled the objection, and permitted the bond to be read.

The defendant also objected to the evidence of the judgment, because it was not proved that it was the same upon which the execution mentioned in the declaration was issued, but the court permitted it to be read.

The defendant also objected to the evidence of one C. C. Sellers, who proved that the execution, after diligent search, could not be found in the clerk's office, because he was not the keeper of the office; but the evidence was admitted to show its absense and secondary evidence offered of its contents.

The plaintiff also offered to read from the execution docket, the description of the execution, its reception by the sheriff's deputy, return, &c. which was objected to by the defendant, because, on the docket it appeared to be an *alias pluries*, and the declaration described it as an original, but the objection was overruled, and the evidence allowed.

The defendant further objected, that the entry of ten per cent. as damages, adjudged by the supreme court on the execution docket, was not sufficient proof of the affirmance of the judgment by the supreme court, with damages, but the objection was overruled, and the entry read.

It was proved that Jamison, the plaintiff, had obtained a judgment against Thomas Evans as accommodation acceptor, on the same bill on which the judgment on which the execution in the present case issued—that on execution against Thomas Evans, plaintiff, had been satisfied of his claim—that the interest in the judgment against H. S. Evans, had been transferred by Jamison to Josiah Evans, administrator of Thomas Evans, but it was not shown that it was in writing—that the agent of Josiah Evans, whose authority was not shown to be in writing, demanded the money of one Daniell, the deputy of Hill, and gave in evidence to the jury, the reply of Daniell to the demand. This testimony was objected to, but permitted to go to the jury.

It was also in evidence, that Hill, the sheriff, left the State—that during his absence, his office was declared vacant; that after Hill left the State, Daniell still continued to act as his deputy—that after the office was declared vacant, Daniell still continued to act as deputy—that during this period, Daniell made the money on this execution, by a sale of property, and paid a part over to Josiah Evans. The demand above spoken of, was also made during Hill's absence.

Under this proof, the defendant's counsel moved the court to charge the jury, that if plaintiff had received his money of Tho's Evans previous to the demand in this case, he could not recover. That a demand must be proved to have been made of Hill or his sureties, and that a demand of Daniell. the deputy, was not sufficient. That unless a transfer, in writing, of the judgment from Jamison to Josiah Evans, and an authority in writing, by him, to the person making the demand, was proved, the plaintiff could not recover. The court refused to give these charges, and then

charged the jury, that if Jamison had obtained judgment and execution against two different parties to the same bill, and collected the amount from one, he might permit the money to be collected on the other execution for the benefit of the party entitled to it. That if Daniell was the authorized deputy of Hill, and continued to act as such in his absence, by making the money in this case, and retained the money, and continued to act for Hill, then a demand of Daniell was sufficient; although, during Hill's absence, and after his office had been declared vacant. That it was not necessary that the transfer of the judgment from Jamison, or the authority from Josiah Evans to make demand, should be in writing.

To the charges given and refused, and to the other matters contained in the bill of exceptions, the defendant excepted.

Assignments of error.

1. The court erred in overruling the demurrer.

2. In permitting the plaintiff to strike out some of the breaches assigned after demurrer overruled.

3. The court erred as set forth in the bill of exceptions.

4. In proceeding to trial without replying to the pleas.

Dear, for the plaintiff in error.

Sellers, *contra.*

ORMOND, J.—We consider the breaches upon which the cause was tried, well assigned. The first and seventh breaches alledge in substance, that Hill, as sheriff of Wilcox county, received the execution which issued on the plaintiffs' judgments on a day which is set forth, returnable to the next succeeding term of the court, and that he made the money thereon. It is true, no special request is alleged to have been made of the sheriff for the money, nor was it necessary to allege one. The *licet saepius requisitus* was sufficient, at least in this State, when special demurrers are abolished. That the omission cannot at this day be taken advantage of by general demurrer, [see the authorities referred to in 1 Chitty's Pleading, 324,] the law was ruled otherwise by this court in McBroom v. The Governor, [6 Porter, 32,] but we are satisfied the decision was wrong. The sixth breach assigned, is, for a failure to return the execution, and is in the usual form. We have not thought it necessary to examine

the four assignments which were abandoned by the plaintiff on the trial, as his right to do was unquestionable, even after the defendants demurrer had been overruled.

The remaining questions arise on the bill of exceptions. The court did not err in permitting the plaintiff to read the official bond of the sheriff, which was described and set out in the declaration. If a subsequent bond was executed, which superseded the bond declared on, the fact should have been put in issue by plea.

It was not necessary in this action, to produce the judgment on which the execution issued; the recital of its existence in the execution under which the sheriff acted, was at least *prima facie* evidence of the fact.

The objection that the preliminary proof, that the execution was not to be found in the clerk's office, was not sufficient to let in secondary evidence, was properly overruled by the court, so far as we can judge from the record. The objection was, that the person who made the examination, was not the keeper of the office, but it by no means follows, that he did not have access to the office to make the search, or that he was not assisted by the clerk in making it. Nor, indeed, is it shown that the execution was ever returned to the clerk's office by the sheriff, but the contrary is inferrable, from the whole case. This is, then, one of the cases in which very slight evidence of the absence of the lost paper would be sufficient, the more especially as there must have been extant on the records of the court, and the books of the clerk's office, permanent evidence of all the constituent parts of the execution.

It was not a variance between the allegations and the proof, that in the declaration the *fieri facias* received by the sheriff, is described as an "execution,," and the proof showed it to be an *alias pluries fi. fa.;* the former is a generic term which embraced the latter.

Upon the affirmance of a judgment of an inferior court, by this court, the certificate of that fact, which the clerk of this court sends to the inferior court, is the record of the affirmed judgment upon which the execution issues. As already observed, the recital of the affirmed judgment in the execution, authorised the sheriff to collect the ten per cent. damages awarded against the defendants, and being proof of that fact as against the sheriff,

superseded the necessity of producing the record of the judgment.

It did not lie in the mouth of the sheriff to object, that the judgment of the plaintiff had been satisfied by the payment of another judgment obtained on the same bill. Having collected the money by the authority of an execution on a judgment of the plaintiff, he could not dispute his right to receive the money.

The only remaining question is, whether the demand made of the deputy sheriff was sufficient. The facts stated are, that Daniell was the authorised deputy of the sheriff Hill, both before and after the latter left the State. That during the absence of Hill, his office was declared vacant, after which Daniell continued to act as his deputy, and collected the money on this execution. It is not necessary to consider how far the *exparte* proceeding under the statute, by which the Governor was officially notified that Hill's office was vacant, affected his right to the office, because, conceding that it vacated his office as fully as if his term had expired, he had the undoubted right to complete the execution of process which he had begun. The jury have found that Daniell, in the collection of this money, was his authorized deputy, and he must of necessity have also been invested with the power of paying it over. A deputy sheriff, invested with all the power of his principal to collect money by a *fieri facias*, and actually collecting it, cannot refuse to pay it to the plaintiff without putting his principal in default. Conceding then, that a demand was necessary, this was a sufficient demand, and as the authority of the plaintiff to make it, was shown, it was not necessary that it should have been in writing.

Let the judgment be affirmed.

SMITH v. NELSON.

1. In less than two months after the grant of administration, the administrator was served with a *scire facias* to revive a suit at law pending against the intestate at the time of his death; he retained counsel to appear for him, and claim a continuance. The counsel appeared on the first day of the term, and objected to a judgment against his client: on some subsequent day of the term, without the knowledge or consent of the administrator or his counsel, a judgment was rendered against the former, though the case was not reached in a regular call of the docket; and neither of them had notice of the judgment until after the adjournment of the court. The administrator reported the estate insolvent, according to the statute in such case; his report has been confirmed, and the appropriate orders made for its settlement. If the judgment remains in force, the administrator will be personally charged with its payment, although he has not wasted the estate of his intestate: *Held*, that it was competent for a court of equity to give relief, by injoining the judgment against the administrator.

WRIT of error to the Court of Chancery for Lowndes county.

On the first of September, 1842, the plaintiff in error filed his bill against the defendant, stating that Stewart Farley, now deceased, made his promissory note on the 18th July, 1840, by which he promised to pay to Gilchrist & Bedford the sum of three hundred and fifteen 39-100 dollars one day after date; that the note was endorsed by the payees to the defendant, who, on on the 29th of September, 1840, brought an action thereupon against the maker in the circuit court of Lowndes. It is further stated, that after the execution and return of the writ, about the month of December of the same year, Farley died intestate. On the 24th of that month, the complainant was duly appointed administrator of his estate, and about the 15th of February, 1841, the defendant caused a *scire facias* to be issued by the clerk of the circuit court, requiring the complainant to appear at the term thereof to be holden in the spring of 1841, and show cause why the suit should not be revived against him. This *scire facias* was executed three days after it issued. The complainant thereupon retained N. Cook, Esq., whom he instructed to claim a continuance at the return of the *scire facias*, that he might have time to examine into the situation of his intestate's estate—

gave himself no farther trouble about the cause at that term of the court. He is informed by his attorney, that the case was called on the first day of the court, when the plaintiff moved to make him (complainant) a party, and have judgment rendered against him; but his attorney objecting, it was passed, and, according to the practice in such cases, could only be disposed of when regularly called in its order upon the docket. The cause was number 331, and in the regular call number 38 was the last that was disposed of, and his attorney was ready to attend to it when reached in its order; but much to the surprise, both of the complainant and his counsel, a judgment by default was rendered against the complainant on some day of the term. Of the judgment thus rendered, neither the complainant or his counsel had notice until after the adjournment of the court, so that they could move to set the same aside. With a view to the reversal of the judgment, the complainant prosecuted a writ of error to the supreme court, but the same has been there affirmed, and he thus made personally liable to its payment; and this, although he has never embezzled or wasted the assets of his intestate's estate. He also alleges, that the estate is insolvent; that he has reported the fact to the proper court, according to the statute in such cases; his report has been confirmed, and the appropriate orders made for its settlement. The bill concludes with a prayer for an injunction, which was accordingly granted. At the term of the court of chancery next after the exhibition of the bill, and before the coming in of the answer, the same was dismissed for want of equity.

N. Cook, for the plaintiff in error. The complainant is not chargeable with neglect for not having defended at law; both himself and counsel did all that could reasonably be required, and more the law does not exact. But if this be not so, it must be remembered that the complainant was not sued in his own right, but as the representative of an estate, with the administration of which he is charged by the law. Much greater indulgence is extended to persons who have such trusts to perform. [2 Vern. Rep. 146; 2 P. Wms. Rep. 69—70; 17 Johns. Rep. 1; 2 Stewt. Rep. 420; 1 Stewt. & P. Rep. 135; 7 Porter's Rep. 549; 7 Cranch's Rep. 332.]

Boling, for the defendant, insisted that the judgment at law was conclusive upon the complainant, and that a court of equity could not entertain his case. He should have attended in the circuit court by his counsel during the entire term; and if a judgment was rendered against him at an improper time, or in an improper manner, he should have asked that court to set it aside. [4 Ala. Rep. 183; 7 Porter's Rep. 549; 3 id. 436; 6 id. 24; 1 Stewt. Rep. 107; 2 Stewt. & P. Rep. 58; 3 Johns. Ch. Rep. 351.]

COLLIER, C. J.—1. I am inclined to think that neither the complainant nor the counsel employed by him, are justly chargeable with neglect in not having resisted a judgment in the circuit court. The suit could not have been regularly tried at the term to which the *scire facias* was returned, if the complainant objected; all that was necessary for him to do, was upon being made a party, to claim a continuance. He retained an attorney, and instructed him to take this course. The cause was never regularly reached, so that, according to the order of proceeding, no judgment by default should have been rendered. This being known to the attorney, he was not, in my opinion, at fault in being temporarily absent from the court, or in not having examined its minutes to ascertain if the cause was disposed of, and moving to set aside the judgment. If the opposite conclusion deprived the complainant of relief in equity, then he would be utterly remediless; though he had taken the usual steps to obtain a continuance, and make defence, should the assets of the estate he represented require it. The estate being insolvent, he could not obtain full indemnification from that source; and his attorney, not being chargeable with gross negligence, could not be called on to repair the loss. But this is only my view: my brethren think the jurisdiction of chancery may be supported without inquiring whether the circumstances considered, would, in general, relieve a case from the want of diligence, in making defence at law, and decline an expression of opinion on the point.

2. Placing out of view every thing that is alleged in respect to the employment of counsel, &c., the case presents itself in the same predicament in which it would if the complainant had made no effort to prevent a judgment. Regarding it in that posture, we address ourselves to its consideration. Mr. Justice Story, in his Commentaries on Equity, says, "relief will be

granted where the defence could not, at the time, or under the circumstances, be made available at law, without any laches of the party. Thus, for instance, if a party should recover a judgment at law for a debt, and the defendant should afterwards find a receipt under the plaintiff's own hand for the very money in question, the defendant (where there was no laches on his part) would be relieved by a perpetual injunction in equity. So, if a fact, material to the merits, should be discovered after a trial, which could not by ordinary diligence have been ascertained before, the like relief will be granted." [2 vol. 179—180.]

Relief has been granted to an executor who had confessed judgments in suits brought against him by the creditor of the testator, under the belief that the assets of the estate were amply sufficient to pay all claims against it; the amount of assets proving afterwards inadequate, in consequence of an unexpected depreciation of property. The executor it was considered, under the circumstances, should not be answerable out of his own estate, in default of the testator's assets, for the debts on which the recoveries had been had; which were all charged by the testator's will upon his whole real and personal estate. [Miller v. Rice, 1 Rand. Rep. 438; 2 Lomax's ex'rs, &c., 395.] In that case, it was thought the confession of judgments, under the circumstances, did not place the executor in a worse situation than a false plea would under the equity of the Virginia statute, which exempted him from liability beyond the assets, in consequence of any false pleading, mispleading or non-pleading.

Viewing the case in a light most unfavorable for the complainant, he can only be considered as having pretermitted all defence in the circuit court—in fact, that at the time the judgment was rendered, he knew of no defence that would have availed to defeat a recovery. True, he might have obtained a continuance had he intimated such a wish to the court, and this would have been a prudential course; yet as he was not informed of the condition of the estate, it is believed that he is not concluded in equity. If the complainant has not wasted the assets, and they are insufficient to pay the demands upon the intestate's estate, the defendant has no claim in moral justice to charge him individually. The facts, that he is a trustee, and has acted, so far as the record shows anything upon the point, in good faith, and that the

insolvency has developed itself since the judgment was obtained, it is believed entitle him to relief.

My brethren rest their opinion exclusively upon the second point considered. While I will not gainsay their conclusion, I must be permitted to say, that I place my concurrence in the result, mainly upon the sufficiency of the reasons stated in the bill, to repel the inference of neglect, in not defending at law.

It remains but to add, that the decree is reversed, and the cause remanded.

McMURRY v. THE STATE.

1. An indictment for perjury, alleging that, in a trial of a suit between P. and M. before a justice of the peace, it became a material question, "whether M. on the —— day of ——, 1840, was ready to deliver on demand, certain plank to P. according to the contract between them;" on which trial M. swore "that he had the plank always ready for P;" meaning thereby that he had the plank ready to be delivered to P., according to the contract, on the —— day of ——, 1840, when, in truth and in fact, M. did not, on the —— day of ——, 1840, have the plank ready to be delivered to P. in accordance with the contract between them, is bad.
2. When the contract is to deliver plank on demand, it is necessary to make a demand, to put the party in default; and in a suit for the non-delivery, the material question would be whether a demand was made; it is difficult to conceive of perjury, in its legal acceptation, committed on such a trial, unless the swearing is, that no such demand was made, when, in fact, the truth was otherwise.
3. In a trial for perjury alleged to have been committed in giving evidence in a cause before a justice of the peace, growing out of a written contract, it is necessary that the record or papers of the suit and the contract, should be produced or accounted for; the first is necessary to show the identity of the proceedings with those described in the indictment; and the other, to ascertain the legal effect of the contract, and consequently what questions of evidence were material or otherwise in that suit.

Writ of error to the Circuit Court of Bibb county.

Indictment for perjury. The allegation of the indictment is,

that in a certain cause depending between one Martin Peters and the said Charles G. McMurry, the latter was introduced as a witness for himself, and it became a material question, "whether the said Charles G. McMurry, on the —— day of —— 1840, was ready to deliver on demand, to the said Martin Peters, certain plank, according to the contract between them," and the said Charles G. McMurry deposed and swore that he "had the plank always ready for the said Martin Peters; meaning and intending thereby that he had the plank ready to be delivered to the said Martin Peters, according to the contract on the —— day of ——, A. D. 1840, when in truth and in fact, the said Charles G. McMurry did not, on the —— day of ——, A. D. 1840, have the plank ready to be delivered to the said Martin Peters, in accordance with the contract aforesaid." The defendant was convicted and sentenced to the pillory and whipping. In the progress of the trial, a doubt arose in the mind of the presiding judge, from the examination of the justice before whom the trial, in which the perjury is said to have been committed, was had, as to whether the suit was upon a promissory note or other writing; and thereupon the defendant's counsel moved the court to exclude the evidence of the trial, unless the papers in the cause were produced: this was overruled by the court; but the witness was not permitted to speak of the contents of any paper, and was confined in his testimony to the oral proceedings had before the justice at the said trial. This question was reserved as novel and difficult. A writ of error was allowed at a former day of the court, and it is now assigned with other matters. 1. That the indictment is insufficient. 2. That the evidence admitted was irregular, without the production of the papers in the cause.

Peck, for the plaintiff in error, argued the case on behalf of T. Crawford—cited 1 Chitty's Crim. L. 171; People v. Lambert, 9 Cowen, on the first point, and Greenleaf's Ev. 99, on the second.

GOLDTHWAITE, J.—The averment of the indictment is, that it became a material question on the trial of this cause before the magistrate, whether the defendant on the —— day of ——, 1840, was ready to deliver on demand certain plank, to one Peters, *according to the contract between them.* The italicised words do not affect the meaning of this averment, because the

contract is previously shown to have been to deliver the plank *on demand*, and if this term was controlled, or in any manner explained, by other parts of the contract, it should have been stated. This being the material question, it becomes necessary to inquire what is the legal effect of such a contract, and what are the obligations it imposes. The case of Thackston v. Edwards, [1 Stewart, 524,] settles, that where there is an agreement to deliver a ponderous article upon a *day certain*, that no demand is necessary to entitle the plaintiff to maintain his action, though it may be defeated by plea and proof that the defendant was ready on the day agreed upon, with the article, and that the plaintiff came not to receive it. The reason for this is, that the plaintiff is not required to do a useless act by making a demand which the defendant was not in readiness to comply with. But we apprehend the rule is different, when no time is fixed for the delivery of the article; then, in order to put the defendant in default, it is necessary to make a demand, and it may be found to be the law, that he should also appoint a reasonable day for the delivery; for it cannot be expected that one shall always have a ponderous article ready to be delivered, until some time is ascertained, either by the consent of the parties, or by notice from one to the other. With this view of the contract, out of which the material question is supposed to arise, let us ascertain what the defendant swore. The averment is, that he swore "he had the plank always ready for the said Martin Peters." Now, if the contract had been to deliver the plank upon a day certain, it is evident that this swearing would have made out a complete defence to the suit, according to the decision of Thackston v. Edwards; but inasmuch as the averment is, that the material question was, whether the defendant was ready to deliver it *on demand*, the evidence of the defendant was entirely *immaterial*, and therefore, not the subject matter of perjury, unless Peters had previously made proof of a demand. As the oath of the defendant was material or otherwise, according to the previous proof in the case, to make the indictment good, it should contain either an averment that such proof had previously been given, or the same effect should have been shown by an *inuendo*, that the defendant meant thereby, that he had the plank ready to deliver when the demand was made.

2. Indeed, if the contract was, as it is stated to be, the material

question would be, whether a demand was made by Peters, and it is difficult to conceive of perjury in its legal acceptation, committed in a trial of a suit between these parties, for the non-delivery, unless the defendant swore that no demand was made, when in fact the truth was otherwise.

It is evident that the indictment does not conform to our view of the legal effect of the contract, as stated, and therefore, we hold it bad.

3. We are not able to determine with certainty, whether the question reserved had reference to the proof of the proceedings before the magistrate, or to the writing by which the contract between the parties was evidenced; but whether it was the one or the other, the written evidence should have been produced, or its absence accounted for. The identity of the proceedings before the magistrate with those described in the indictment, could only be known by comparing his record or his papers, with the averments. The written contract, if there was one, was the only proper mode of ascertaining its legal effect, and consequently, of ascertaining what questions of evidence were material or otherwise, at the trial before the justice. It should, therefore, have been produced, or its absence accounted for.

As the prosecutor may wish to prefer another indictment, we shall remand the cause in order that the defendant may not be discharged without recognizance,

Judgment reversed and remanded.

READY AND BANKS, Ex'rs, v. THE MAYOR AND ALDERMEN OF THE CITY OF TUSKALOOSA.

1. The corporation of Tuskaloosa made proposals for building a wall across a gully, which, among other things, provided that the work was to last for ten years, and required bond and security for the faithful performance of the contract. The work was undertaken by one J. W., who, with E. S. as his surety, executed to the corporation a penal bond, which recites most of the terms contained in the specification, and which was also attached to the bond, and

concludes—Now, if the said J. W. shall do accordingly all matters and things as stated in said specification alluded to, and faithfully do and perform said undertaking or contract, in the best workmanlike manner, and in the shortest practicable time, then this bond to be void, &c. *Held*, that the surety was bound to the same extent as the principal, and was therefore liable on the bond for damages, the wall having been carried away by a freshet before the expiration of ten years.

2. When the name of a corporation is changed, it may sue in its new name, to enforce its former contracts, averring that they were made with it by its former designation.
3. The corporation is not liable for the acts of its marshal, unless done by its direction.
4. The corporation having failed to pay the last instalment due for the work, it was competent for the defendant to prove this fact in mitigation of the damages.

ERROR to the Circuit Court of Tuskaloosa.

This action was brought by the defendants against the plaintiffs in error upon a penal bond. The declaration is as follows:

The Mayor and Aldermen of the city of Tuskaloosa complain of Aaron Ready and Willis Banks, executors, &c., of a plea of debt, that they render to the plaintiffs the sum of eight thousand dollars, &c. For that whereas the said Edward Sims, in his life time, to wit: on the 20th May, 1833, at, &c., together with one John J. Webster, not sued in this action, by his certain writing obligatory, sealed, &c., acknowledged himself to be held and firmly bound to the plaintiff, by the name and style of the Mayor and Aldermen of the *town* of Tuskaloosa, and their successors in office, in the said sum of eight thousand dollars, to be paid to the said plaintiffs and their successors in office. And the said plaintiffs, according, &c., say that the said writing obligatory was made with a condition thereunder written, that whereas the said John J. Webster had undertaken, by contract, to do certain work upon a certain ditch known as being near Colgin's smith shop, according to the specifications, as were stated upon a half sheet thereunto attached, for the sum of four thousand dollars, one-fourth part to be paid whilst the work was progressing, or when the work was completed, and the balance at three equal annual instalments from the time the work was done, as specified. He, the said John J. Webster, warranting the same to stand for the term of ten years, in good order, from the time the

same was completed, then if the said John J. Webster did so according to all matters and things as stated in said specifications alluded to, and faithfully did and performed said undertaking or contract in the best workmanlike manner and shortest practicable time, then said bond to be void, otherwise to remain in full force and virtue.

And said plaintiff further says, that in the said specification in the condition of the said writing obligatory mentioned, which the said plaintiff now brings into court, it was specified that the work on the big wash or ditch near Colgin's shop, should consist of a wall of good large rock or good well-burnt brick, fixed on a good firm foundation, and laid in good lime and sand cement or mortar, the wall to be run at the lower or north side of broad street, extending from the extreme break near Colgin's smith shop to the extreme break towards Dr. Tindall's. The wall to be at least one foot higher than the graduation of the street the whole extent on each side the wash. Broad street to be graduated east from the wash as far up as to the cross street between Dr. Tindall's and E. Smith's, and the slope to be regular and gradual; and west of said wash as far as the cross street near Col. Donaldson's, with the same gradual slope. The side walks are to be preserved, and where the streets are cut down at the sides, to have them sloped, and not abrupt; and to graduate College street from Broad street to Cotton street, with a gradual slope. In the graduation of Broad street at the wash, to have the fall, from the mouth of the ditch, where the plank conductor is in it, to the north side of Broad street where the wall is constructed, about one foot. To make a good pavement, well put down of rock, entirely across Broad street, where the water passes from the ditch, at least twenty feet wide the whole width of the street. To make arrangements to prevent the water falling abruptly over said wall so as to produce a wash below the wall, and to pass the water off freely down the wash. The work to be commenced immediately, and to be performed in as short a time as practicable, and to be warranted for ten years from the time the work is completed, and to be kept in good order during that time, and the whole of the wash to be left in a good condition at the end of ten years. For which the said plaintiff was to give four thousand dollars, payable, &c.; and although the said plaintiff has well and truly performed, &c. &c. Yet protesting, &c. the said plaintiff in fact

says that, although it was always ready and willing, and did pay, &c., yet the said John J. Webster, or the said Edward Sims, in his life, or either of them, or any person in their behalf, did not nor would, after the making of the said condition and specification, do and perform the said work upon the said ditch according to the said specification and condition, and do and perform such undertaking and contract in the best workmanlike manner, nor did nor would keep the whole of said work in good order and condition according to the form and effect of the said specification and condition in that behalf, but on the contrary thereof, &c., negativing all the undertakings in the condition and specification, and charging that in consequence the work became ruinous, &c.

2d breach: That in consequence of the unfaithful and unworkmanlike manner in which the work was completed, it did not last for the space of ten years from the time when it was completed, whereby, &c.

The defendants craved oyer of the bond, condition and specification. The latter are as follows;

"Whereas, the above bound John J. Webster, has undertaken by contract to do and perform certain work upon a certain ditch, known, &c., according to the specification, as is stated upon a half sheet of paper hereto attached, for the sum of four thousand dollars, one-fourth to be paid while the work is progressing, or when the work is completed, and the balance at three equal annual instalments from the time the work is done as specified. He warrants the same to stand for the term of ten years from the time the same is completed. Now, if the said John J. Webster shall do accordingly all matters and things as stated in said specification alluded to, and faithfully do and perform said undertaking or contract in the best workmanlike manner, and in the shortest practicable time, then this bond to be void, otherwise, &c. (Signed,) J. J. Webster, [Seal.]
Edward Sims, [Seal.]

Specification.

A plan for the work on the big wash, adopted by the committee appointed by the Mayor and Aldermen of the town of Tuskaloosa, to contract for filling and securing the same.——A wall of good large rock, or good well-burnt brick, fixed on a good firm foundation, and laid in good lime and sand cement or mor-

tar; the wall to be run at the lower or north side of Broad street, extending from the extreme break near Mr. Colgin's smith shop to the extreme break towards Dr. Tindall's; the wall to be at least one foot higher than the graduation of the street the whole extent on each side the wash. Broad street to be graduated east from the wash as far up as the cross street between Dr. Tindall's and E. Smith's, and the slope to be regular, and graduated west of said wash as far as the cross street near Col. Donaldson's with the same gradual slope, the side walks to be left; and where the streets are cut down at the sides, to have them sloped, and not abrupt; and to graduate College street from Broad street to Cotton street, with a gradual slope. In the graduation of Broad street at the wash, to have the fall, from the mouth of the ditch, where the plank conductor is in it, to the north side of Broad street, where the wall is constructed, about one foot. To make a good pavement, well put down, of rock, entirely across Broad street, where the water passes from the ditch, at least twenty feet wide the whole width of the street. To make arrangements to prevent the water falling abruptly over said wall, so as to produce a wash below the wall, and to pass the water freely off down the wash. The work to be commenced immediately, and to be performed in as short a time as practicable, and to be warranted for ten years from the time the work is completed, and to be kept in good order during that time. The whole of the work to be left in a good condition at the end of ten years; for which they will give four thousand dollars, one-fourth of the amount to be paid while the work is in progress, or when it is completed, and the balance in three equal annual instalments from the time the work is done as above specified. The undertaker giving bond with approved security for the faithful performance of the contract."

The defendants demurred to the declaration, which was by the court overruled.

The defendants then pleaded five pleas.

1. After *oyer* of the bond, condition and specification, *onerari non;* because, they say, that the said John J. Webster, did do all matters and things as stated in said specification; did attend to and faithfully do and perform said undertaking and contract in the best workmanlike manner and shortest practicable time; and this, &c.

2. The second plea avers, that the said John J. Webster did, immediately after the contract made between him and the Mayor, &c., commence the work in said specification mentioned, and did, in a good workmanlike manner, perform the same in as short a time as practicable; and this, &c.

3. The third plea recites all the conditions mentioned in the specification, (except that the work was to last, and did last for ten years,) and avers performance according to the contract.

4. *Nul tiel* corporation.

5. *Onerari non*, because they say that said Webster did begin the said work in the said condition and specification mentioned, and did complete the same in the shortest practicable time, in a good workmanlike manner, and did keep the same in good order and repair according to the true intent, legal effect and meaning of the said condition and specifications; and of this, &c.

The plaintiff demurred to the three first pleas, and took issue on the two last. The court sustained the demurrers, and decided the issue in law in favor of the plaintiff; and the jury having found a verdict for the plaintiff for two thousand dollars, judgment was rendered accordingly.

Pending the trial, a bill of exceptions was sealed, from which it appears that testimony was offered tending to show that the work was not done in a workmanlike manner; that the work was completed in 1833, and was destroyed by a great flood in 1840. That the last instalment had not been paid to Webster.

The defendants proved that the marshal of the town had pinned plank across the aqueduct to make a pass way for foot passengers, which, when it rained, had damned up the water, and prevented it from flowing through the aqueduct as it otherwise would have done; and that the witness being an alderman, he spoke of it to the Mayor and Aldermen, and told them that it would produce injury to the wall.

Whereupon the court charged the jury—1. That whatever Webster, as principal, undertook to do, Sims, as his surety, undertook that he would do. 2. That the delay of payment by the corporation did not excuse Webster for not doing the work, or keeping it in repair, according to the contract. 3. That the interference of the marshal of the corporation with the work, unless by the order of the corporation, did not impair their right to recover.

The counsel for the defendant moved the court to charge that the jury might deduct the last instalment, if not paid, from any damages they might consider the corporation entitled to; which charge the court refused, upon the ground that Webster could maintain his action at law, and that this was not a case for an offset. To all which the defendants excepted.

Upon the issue on the plea of *nul tiel corporation*, the plaintiff offered no other testimony than the several acts of the Legislature incorporating the town and city of Tuskaloosa.

The assignments of error are—1. In overruling the demurrer to the declaration. 2. In sustaining the demurrer to the pleas. 3. In finding the issue in law for the plaintiff. 4. In the charges given and refused.

Peck & Clarke, for plaintiff in error. The declaration is bad, because it does not aver that the plaintiff is a corporation, and the court cannot judicially take notice of it. [3 B. & P. 40; 6 Petersdorff's Ab. 642; Chitty's Precedents, 2, note E.; 1 Ch. Blackstone, top page, 86, note 21; the case of Madison College at this term.] 2. Because it does not sufficiently aver performance of conditions precedent. [1 Ch. Pl. 309, 16.]

The assignment in the second breach is bad, because the warranty that the work should stand for ten years, was confined to Webster, the principal. For the same reason, the demurrers to the pleas should have been overruled.

The court should have permitted the jury to consider the failure of the plaintiff to pay the last instalment in their estimate of the damage, not as a set-off, but by way of *recoupement*. [4 Wendall, 22, 51, 155; 3 Hill, N. Y. 171.]

Porter, *contra*. It is not necessary, in a suit by a corporation, to aver that it is a corporation: it is sufficient that it sues by its appropriate name. [14 Johns. 245; 9 Cowen, 778; Angel & Ames on Cor. 2 Ed. 501.]

The three first pleas are bad, because they do not answer the whole declaration. [Gould. Pl. 358, 365, 370, 152; 1 Johns. 753; 2 ib. 413; 1 B. & P. 455; 3 Bibb, 330; 1 Littell, 5; 2 Mass. 97; 1 Greenleaf, 190.]

The issue upon the plea of *nul tiel* corporation was sustained by the production of the charter, passed in 1836, creating "The

Mayor and Aldermen of the city of Tuskaloosa" a body corporate by that name. The question which the defendants sought to make could only have been raised by a plea averring an *ouster*, dissolution, &c.

That a declaration is good which avers a contract with a corporation by a different name. [See 10th Mass. 360; 13 Johns. 38; 1 Pen. 115; 5 H. & J. 122, 5 Hals. 323; 6 S. & R. 16; Angel & Ames on Cor. 503; 1 Ala. Rep. 243.]

Independent of this view, the act of 1836, secures to the corporation all rights which previously belonged to the Mayor and Aldermen of the *town* of Tuskaloosa, and certainly settles this question.

The specification is as much a part of the condition of the bond, as if it had been written out at length, and shows very clearly that security was required for all the stipulations entered into by the principal. [1 Hawks, 20; 7 J. J. Marshal, 192; 1 Munf. 45; 2 Con. 78; 6 Johns. 49; 5 G. & J. 239.] And such a construction must be put upon it as will render the whole operative. [1 Har. 154, 233; 1 Wend. 228; 1 Johns. C. 319; 3 Fairf. 65.]

The contract of the corporation was to pay in instalments when the work was completed according to the contract. Until such performance, there was no obligation on the corporation to pay; and, therefore, there can be no right to diminish the damage from the omission to pay. [3 H. & J. 163.]

If the marshal of the corporation interfered with the work, to the injury of Webster, he is responsible to him. The corporation is not liable, unless it directed or authorized such interference.

ORMOND, J.—The principal question in this cause is, the construction of the covenant—the plaintiff in error contending that Sims, the surety, did not, by the covenant he entered into, warrant the work to stand for ten years. The interpretation of the covenant is to be gathered from the language employed by the parties, considered in connection with the subject matter of the contract.

The corporation of Tuskaloosa, desiring to build a wall across a wash or gulley, so as to arrest its further progress, made proposals by a written specification, describing minutely the work to be done, the manner and the time within which it was to be done, and the price it was willing to pay for it. The work to

be left in a good condition at the end of ten years, and to be kept in repair during that time; the undertaker to give good security for the faithful performance of the contract. The work was undertaken by one Webster, who, jointly with the testator of the plaintiffs in error, executed a penal bond, the condition of which recites the contract entered into by Webster with the corporation, and refers to the specifications attached thereto, and proceeds—"Now, if the said John J. Webster shall do accordingly all matters and things, as stated in said specification alluded to, and faithfully do and perform said undertaking or contract in the best workmanlike manner, and in the shortest practicable time, then this obligation to be void, otherwise," &c.

It is most undeniable that Webster was bound by this covenant to do and perform all things contained in the specification; that was in fact the contract between him and the corporation, although its most material provisions are repeated in the condition of the bond to which it is annexed, and of which it forms a part. Webster then undertook that the work should last for ten years from the time of its completion; and, in our opinion, the surety is bound to the same extent. The duration of the work was the most important term of the contract, and for the faithful performance of the contract, surety was to be given as one of the conditions on which it was to be let. When, therefore, the measure of the liability of the principal is ascertained, that shows the extent of the liability of the surety.

The argument of the counsel for the plaintiff in error, that the surety did not intend to be bound for the durability of the work, is founded upon the language employed in the latter part of the condition—"Now, if the said John J. Webster shall," &c., as indicating that the surety was only to be bound for the performance by Webster of the particular matters there enumerated. This portion of the condition expressly provides that Webster shall *do and perform all matters and things contained in said specification;* and, although afterwards certain particulars are mentioned, which are included in the specification, by no fair rule of interpretation can this be understood as limiting the previous portion of the condition. The latter clause is not repugnant to, or inconsistent with, the former; but is merely snperfluous. But if any doubt were created thereby, the specification which is in truth the contract, shows that surety was to be required for its per-

formance; and it would be a strange rule of interpretation to permit a mere inference, conceding it to be such, to overturn an express term of the contract, and thereby to defeat the very object in view in requiring surety to be given. The very converse is the true rule; doubtful and ambiguous terms should be so construed, if possible, as to give effect to the clearly expressed intention of the parties. Sims, the surety, being bound, therefore, to the same extent as the principal, the court correctly sustained the demurrers to the pleas, which are framed upon the contrary supposition.

This contract was made with the Mayor and Aldermen of the *town* of Tuskaloosa; and subsequently, in 1836, the style of the corporation was changed to that of the Mayor and Aldermen of the *city* of Tuskaloosa. The action is brought by the city authorities by this latter name, and allege in the declaration that the bond was made to it by the name and style of the Mayor and Aldermen of the town of Tuskaloosa; and in our opinion this is sufficient. In the case of the Madison College v. Burke, at this term, we held, that a count upon a note made to the Trustees of the Manual Labor Institute of South Alabama, without connecting the Madison College with it, so as to show a legal title in the instrument declared on, was bad. In this case, that is done by the allegation that the bond was made to the corporation by the name in which it was given. The act of 1836, changing the corporate name, expressly reserves to the corporation all its rights, and renders it responsible for its obligations; and such would have been the law if no express provision to that effect had been made. [Corporation of Colchester v. Seaber, 3 Burr. 1866.] We think, therefore, the declaration was sufficient; and, for the same reason, the court did not err in its judgment upon the issue of *nul tiel corporation.*

The alleged interference by the marshal of the corporation with the work, thereby, as contended, increasing the danger from freshets, cannot affect the corporation, unless it be shown that he acted by its direction. The master may be liable, *civiliter*, for the acts of his servant acting in the usual course of his master's business; or where, whilst engaged in his master's business, by his negligence, he causes an injury to another. [1 Black. Com. 429; Blackburn v. Baker, 1 Ala. Rep. 178.] Here, the act of the servant was wilful, and not in the prosecution of the business of

the corporation: the corporation is not, therefore, responsible for his acts, unless done by its command.

It remains only to consider the right of the defendant below to set up, by way of *recoupment* of damages, the omission of the corporation to pay the last instalment agreed to be paid on the completion of the work.

It is certainly consonant to justice, that a party should be permitted, when sued for a breach of his contract, to reduce the damages, by showing the injury he has sustained by the failure of the other party to comply with the contract on his part, instead of driving him to his cross action, thereby multiplying suits and increasing litigation without any corresponding benefit. This principle has received the sanction of this court in Greene v. Linton, [7 Porter, 142,] in Hill v. Bishop, [2 Ala. 324,] and in Craddock v. Stewart's adm'rs, [at this term.] The same doctrine is asserted by the supreme court of New York, in Batterman v. Pierce, [3 Hill, 171,] in an elaborate opinion, where the rule, and the reason on which it is founded, are stated with clearness and ability. We can perceive no reason why the rule should not apply in this case. The corporation has certainly not sustained the same amount of damage it would have done, if it had paid the full amount agreed to be paid for the work; the defendant should, therefore, be permitted to mitigate the damage by proof of this fact; and for the error of the court, in refusing to receive such testimony, and in charging the jury that it could not go in mitigation of the damage sustained by the corporation, the judgment must be reversed, and the cause remanded.

CALVERT v. MARLOW, SURVIVING PARTNER, &C.

1. Where an intestate, at the time of his death, had an account with a bank, as the depositor of money, and the administrator deposited in the bank his letters of administration, which entitled him to check for the money, though he permitted it to remain there to intestate's credit: *Held*, that there was not such a

reception, or control of the money, as made the administrator liable, individually, to an action *for money had and received.*

2. Where one partner commingles the money of the firm with his own cash, so that it cannot be distinguished, he is chargeable *pro tanto* in an account with his copartners, as for a conversion; and if in such case the money come to the hands of the administrator of the partner converting it, *it seems*, that an action against him for money had and received, cannot be supported by the surviving members of the firm.

3. *Semble*: An action of *assumpsit* cannot be maintained by a surviving partner against the representative of a deceased copartner for the recovery of a debt due by the latter to the firm, or for money in hand at the time of his death; unless the partnership accounts have been settled, and a balance struck. The remedy in such case, is in equity.

WRIT of error to the County Court of Mobile.

The defendant in error, as surviving partner of Charles Hammond, dec'd, declared against the plaintiff, in assumpsit, for money had and received, &c. The cause was tried on the general issue, a verdict returned for the plaintiff for eleven hundred and one dollars and four cents, and a judgment was rendered accordingly. On the trial, the defendant excepted to the ruling of the court. It appears, that in June, 1841, the plaintiff and Hammond formed a co-partnership in the drug business, in the city of Mobile, and in March, 1842, the latter died; that for sometime previous to that event, the plaintiff attended almost entirely to the business of the firm: *Further*, that Hammond had been engaged in the drug business for some years previous to the formation of the partnership, but with the exception of the store and its profits, he was not known to be in possession of any property, saving one negro, which he had sold. The plaintiff also proved by the books of the branch bank at Mobile, that Hammond had kept an account there for several years, in his own name—that in June, 1840, he had upwards of $1,900 to his credit, and in June, 1841, upwards of $1,300; and that the deposits afterwards made, were made from the 10th of December, 1841, to the 18th March, 1842. The firm kept no account in the bank in the partnership name, but at the time of Hammond's death, there was $1,200 to his credit upon its books, and for the recovery of this sum, the plaintiff's action was brought. It was proved further, that the dedefendant had administered on the estate of Hammond, and filed his letters of administration in bank, in consequence of which, the

money was subject to his check, though it still remained in bank, charged to the credit of the intestate. The defendant prayed the court to charge the jury as follows: 1. If they believed that Charles Hammond died, leaving to his credit the amount sued for, and the same was never received by the defendant, but still remained in bank to the intestate's credit, then the plaintiff could not recover in this action. 2. That under the evidence, the plaintiff as surviving partner, could not recover in this form of action, the money collected and deposited in bank by the intestate.— 3. That if they believed the defendant received the money as the administrator of Hammond, then the plaintiff could not recover the same in this suit as a surviving partner. All of which charges the court refused to give; but charged the jury, 1. If they believed the money deposited in bank was a fund to which the plaintiff had a right as surviving partner, and the depositing the letters of administration by the defendant in Bank, was equivalent in effect to a payment of the money by the bank to the defendant, and a re-deposit by him, then the plaintiff ought to recover. 2. If they believed that the money in question was a fund to which the plaintiff had a right as surviving partner, then the fact, that it had been deposited by Hammond, and had come to the possession of his administrator, as such, would constitute no defence in this action.

J. A. Campbell, for the plaintiff in error, contended that Hammond, by depositing the money in the bank to his individual credit, even conceding that it was once the property of the firm, divested the plaintiff's right to it, and amounted to a conversion of it to the depositor's use; and under such circumstances, an action for money had and received, could not be maintained. [2 Ves. Rep. 582; 6 id. 496; 11 id. 377; 1 J. & Walker's Rep. 241; 17 Wend. Rep. 94.]

Dargan, for the defendant. The defendant below could have checked the money out of the bank; and for all purposes it must be considered as in the same predicament, as if it was in his actual possession, so as to make him liable to the present action.

COLLIER, C. J.—To maintain the action for money had and received, it is said that it must be proved that the money

came into the defendant's hands, or a state of facts must be shewn from which this is inferrable. [2 Starkie's Ev. 106; 2 Saund. on Pl. and Ev. 672.] And further, that *at the time* of its receipt, the plaintiff was entitled to it; for the reason that a chose in action is not assignable. [2 Saund. on Pl. and Ev. 673.] Let us apply these principles to the case before us. At the time of Hammond's death, the books of the bank show, that the sum of twelve hundred dollars was there remaining to his credit, it was also proved that the defendant administered on his estate, and deposited the letters of administration in the bank; upon the authority of which, he might have checked out the money, though it was still standing to intestate's credit. These facts, so far from showing a receipt of money by the defendant, positively negative the fact.—True, he may, if he think proper, withdraw the amount of his intestate's deposit from the Bank, yet until he does so, he cannot be said to have received it. The fact that the plaintiff claimed the money as belonging to the firm, of which he was surviving partner, may have prevented its withdrawal by the defendant, so as to leave the plaintiff to controvert the right to it with the bank. If the intestate had made an individual the depository of his money, who upon the defendant's becoming administrator, promised to pay it to him when requested, could the plaintiff have maintained an action previous to its actual receipt? The case supposed, is really more favorable to the plaintiff than the case made by the record; for there, it is conceded there was a promise to the administrator, but here, there is a mere regulation of the bank, subject to modification by its directory. It is difficult to conceive why the deposit in the bank should be regarded as cash until the defendant had withdrawn it, had it passed to his credit, or in some manner received the benefit of it. [Cowp. Rep. 565; 3 M. & S. Rep. 344; 5 Taunt. Rep. 657, 815.] True, banks may generally be more prompt in meeting their engagements; yet, this, it is presumed, will not be sufficient to give to their liabilities in this respect, a different consideration than is accorded to those of individuals who are equally able to make good their promises.

The action in the present case is in form *ex contractu*, and if the defendant were to die before judgment, it might at the option of the plaintiff, be revived against his personal representatives; yet, if the defendant was to resign his administration, be removed or die, the deposit now in bank would become subject to the check

of the administrator *de bonis non* of Hammond. This view in itself shows that the property in the money did not vest in the defendant by placing in bank a copy of the letters of administration; this was a mere authority to collect the choses in action of his intestate, but did not make him liable for them as cash, until, as we have seen, they were actually realized by him, or they were in some way appropriated to his use.

Again; to entitle the plaintiff to recover, conceding that his action is maintainable, should not the proof show, that the entire sum for which it is sought to charge the defendant, was the money of Hammond & Marlow, kept separate and distinct by the intestate, so as to be susceptible of identification. If the receipts of one member of a firm have been so commingled with his own cash, that they cannot be followed or distinguished, he is considered as having converted them, and is chargeable *pro tanto* in an account with his co-partners. And if such is the fact in respect to the money in question, an action for money had and received, would not lie against the defendant, although the money had actually come to his hands; for in such case he would have received it, not for the use of the plaintiff, but to enable himself to administer his intestate's estate. [Kip v. The Bank of New-York, 10 Johns. Rep. 63.]

It is true, the defendant is not sued as administrator, yet, as he is sought to be charged in virtue of the rights which are conferred upon him as such, we will inquire whether, as the representative of Hammond, he is suable at law upon the case stated in the bill of exceptions. It is said, that on the death of one partner, the survivor is entitled to all the choses in action, and other evidences of debt belonging to the firm. They must be collected in his name; and he is entitled to the exclusive custody and control of them; the books of account are incident to the debts or choses in action; and whoever is entitled to the one, is of course, entitled to the other. The right of action may be said to be transferred to the surviving partner in relation to partnership demands; but he is liable to account to the representatives of his deceased co-partner. [Murray v. Mumford, 6 Cow. Rep. 441; Case v. Abeel, 1 Paige's Rep. 398; Egberts v. Wood, 3 id. 526.] And upon the ground that the legal rights and liabilities of the firm are devolved upon the surviving partner, it has been decided that he may maintain detinue against the representatives of the deceased partner

for the books of account and other evidences of debt belonging to the partnership. [Murray v. Mumford, *supra.*]

But assuming that the plaintiff could make it appear that the money was the property of the partnership, and had not been converted, so as to prevent it from being distinguished from other cash of the intestate, and no action at law can be supported. It has been so often decided as to be no longer disputable, that an action of assumpsit does not lie by one partner against another, unless the partnership accounts be settled, and a balance struck. [Oseas v. Johnson, 1 Binn. Rep. 191; Carey v. Brush, 2 Caine's Rep. 298; Andrews v. Allen, 9 Serg't & R. Reps. 241; Westerlo v. Evertson, 1 Wend. Rep. 532; Williams v. Henshaw, 12 Pick. Rep. 378; Hobart v. Howard, 8 Mass. Rep. 304; Niven v. Spickerman, et al. 15 Johns. Rep, 401.] The law upon this point is laid down by a text writer of high authority, thus: "When money is due from one partner to another, by simple contract on the partnership account, payment except in a few special cases, can only be enforced by application to a court of equity, upon a bill filed for an account, and a dissolution of the partnership. Courts of law will not entertain suits of this nature, because it would be useless for one partner to recover what, upon taking a general account amongst all the partners, he might be liable to refund: *frustra peterit quod mox restiturus esset.* [Collyer on Part. 143. See, also, Grigsby's ex'r v. Nance; 3 Ala. Rep. 347.] The rule, it is true, may be said to have its exceptions, but the mere dissolution of the partnership, whether by death or otherwise, does not make it inapplicable; and a debt due from a deceased partner, *as a partner*, or *money* in hand at the time of his death, can no more be recovered of his administrator than it could of the intestate. To such a case, the reason of the rule applies with all force. Upon the assumption that Hammond was only liable to the plaintiff for the money of the partnership received by him, as for a debt, we think it necessarily follows, that the action was misconceived.

Without attempting to consider with particularity the ruling of the county court to the jury in the charges given and refused, it may be remarked, that it will be obvious upon the slightest examination, that the law was expounded differently from what we have laid it down. The consequence is, that the judgment is reversed, and the cause remanded.

BEAN v. CABBANESS.

1. A debt due from a bankrupt, and other persons as partners, may be set-off against a demand due to the bankrupt individually, although the suit is in the name of the bankrupt's assignee.

WRIT of error to the Circuit Court of Franklin county.

Assumpsit by Cabbaness, as the assignee in bankruptcy, of one Simpson against Bean, to recover a sum of money due by account.

The defendant, under a plea of set-off, offered a note in evidence made by Simpson, the bankrupt, in the firm name of Simpson & Co. The note was past due when the account sued on was contracted. The plaintiff resisted the set-off on the ground that the note was executed by Simpson in the firm name, and not in his individual capacity. The court rejected the note, and this is now assigned as error.

NOOE, for the plaintiff in error, insisted, that if the suit was in the name of Simpson, the note would be a good set-off, and that his bankruptcy could not affect this right.

SILAS PARSONS, *contra*, argued, that the facts of this case involved the same principles as decided in Von Pheel v. Connelly, [9 Porter, 452.] Besides this, under the bankrupt act, the creditors of Simpson have a right that his individual assets shall be applied to his individual debts, and not exhausted in paying those of the firm.

GOLDTHWAITE, J.—It is said, the principle which should govern this case, is identical with that presented in Von Pheel v. Connelly, [9 Porter, 452.] There the plaintiff was the assignee of a note due to one partner, and it was attempted to enforce as a set-off, a debt due to the defendants, from a firm of which he was a member. However the argument to sustain that decision, may support the rejection of the set-off here, it is clear, the facts have little resemblance. Although, under our statute, which per-

mits the assignments of promissory notes, the transfer is clogged with the sets-off then held by the maker, yet, in general, the right of set-off is given in all cases where there are mutual demands; in other words, it subjects the plaintiff to this claim whenever he would be individually liable to an action at the suit of the defendant. In such a case, there is no reason for the expense of two suits, for all the matters in controversy can as well be determined by one. If then the suit was by Simpson, it cannot be denied that the set-off ought to be allowed; and the right of the defendant to insist on it, would arise out of the liability of Simpson to an individual suit on the demand against the partnership. [Pitcher v. Patrick, Minor, 321; Traun v. Graham, 9 Porter, 456; Carson v. Barnes, 1 Ala. Rep. 93.] We do not well see how the fact of bankruptcy, and the assignment consequent upon it, can affect this right of the defendant. [Lord Lanesborough v. Jones, 1 P. Wms. 326.]

It is said, however, that the individual assets of the bankrupt are to be first applied to the discharge of his individual debts, but we apprehend a debt due from him as the member of a firm, is as much an individual debt as any one he can owe. It is true, there is an equitable rule which would compel the partnership funds to be exhausted for partnership debts, but before an individual creditor can claim any benefit from it, he must show that there are such assets which can be pursued. Here there is no proof to warrant the belief of the existence of such assets, even if a court of law was competent to arrest their due application.

We are satisfied the defendant was entitled to his set-off, and therefore, the judgment of the circuit court must be reversed, and the cause remanded.

STRONG v. STRONG.

1. A father, by deed, conveyed certain slaves to his son, stipulating at the time, by parol, for the possession of the slaves during his life, and retained the possession about sixteen years, when the son obtained the possession of one of them without the father's consent. The father having brought an action to recover the slave—*Held*, 1st. That as between him and his son, no length of time would ripen his possession into a title, unless it was held by him adverse to the title of his son. 2d. That to show the character of the possession, it was competent for the son to prove the parol agreement relating to it.
2. In trover, the measure of damages is the injury actually sustained; therefore, in an action brought for the conversion of a slave, if the plaintiff has but a life estate in the slave, the measure of damages is not the value of the slave, but the value of the plaintiff's interest in the slave.

Error to the Circuit Court of Fayette.

Trover by the defendant against the plaintiff in error for a slave.

Upon the trial, as appears by a bill of exceptions, the plaintiff proved possession of the slave for fifteen or sixteen years, before the commencement of the suit, a demand of the slave and refusal to deliver him by the defendant, and rested his cause. The defendant then read in evidence, a deed made by the plaintiff, on the 31st of March, 1818, in the State of Missouri, by which, in consideration of natural love and affection, he conveyed to the defendant and his wife, several slaves, the one in controversy being among the number, and recited in the deed, that he had put the donees in full possession, by a delivery to their agent, Isaac Brewer,

Also, a deed made by the plaintiff on the 1st April, 1818, by which he acknowledged that he had hired the slaves conveyed by the deed above mentioned, from Isaac Brewer, agent for the defendant and his wife, for one year, and in consideration thereof, agreed to pay the taxes on the slaves, to clothe them, and do the smith's work of said Brewer.

The defendant also read the deposition of Brewer, who proved that at the time of the execution of the deed, the defendant lived in Georgia, that he had the deed in his possession for several years.

That the negroes were delivered to him when the deed was made, but that he did not remove them from the house of the plaintiff. They were not delivered to witness at the end of the year. In answer to a question put by the plaintiff, the witness stated that the donor was to keep the slaves during his life, unless he thought proper to deliver them up. That it was named that the old man might keep the negroes to wait on him his life time, and not to dispose of them. At the time this deed was made, the plaintiff made other deeds of gift to his other children. It was proved that he was a very aged and infirm man, having been a soldier in the revolution.

The defendant's counsel moved the court to exclude from the jury all that portion of the testimony of Brewer, which went to show that the plaintiff was to have a life estate in the slave, upon the ground that it was to contradict the deed by parol evidence, but the court refused to exclude it on the ground that it was the testimony of the defendant's witness.

The court then charged the jury, that if they believed the agreement by which the plaintiff was to retain the possession of the slave during his life, was made at the same time with the deed, they must regard it; and if they believed the plaintiff had a life estate, they must find for him.

The defendant's counsel asked the court to charge the jury, that though they should believe there was a contract by which the plaintiff might retain the slave during his life time, and that he was old and infirm, they might assess the damages to less than the full value of the slave, which charge the court refused to give; to all which the defendant excepted, and which he now assigns as error.

L. Clarke, for the plaintiff in error, cited 2 Stew. 276; 5 Bining, 557; 1 Ala. Rep. 684; 8 Pickering, 51, Dall. 275.

Huntington, *contra*, insisted, that although the court may have erred, this court will not reverse the judgment, because it is shown that the plaintiff had possession such a length of time as to give title. He cited, 2 Ala. Rep. 555; 3 Litt. 136; 5 id. 281; 3 H. & Munford, 57; 5 Cranch, 361; 8 Cowen, 589.

ORMOND, J.—It is contended by the counsel for the defend-

ant in error, that although the court may have erred in its charge to the jury, yet as it is evident from the record, that the plaintiff is entitled to recover, this court will not reverse the judgment.

This supposition is derived from the long continued possession of the slave by the defendant in error. As the absolute title to the slave in controversy, is shown to be in the son, as between him and his father, no length of time would bar a recovery, unless the possession of the father was adverse to that of the son. If the possession of the former was by the acquiescence or permission of the latter, it was not inconsistent with the title remaining in the son; and although, as against creditors or purchasers without notice, the possession of the father would be evidence of title, in a contract with the son, he is estopped by his deed, from denying that the title is not in the latter, unless he shows that he has held the slave adversely to him, a sufficient length of time for the statute of limitations to operate a bar to a recovery.

Whether he did hold adversely, or by the consent of the son, and in subordination to the deed, was a question to be determined by the jury, and in this point of view, and to show the character at least, of the commencement of the possession, the testimony of the witness Brewer, was competent.

There is an intrinsic difficulty in ascertaining the value of a life estate in a slave, as it depends on so many contingencies.—This the plaintiff may always prevent, by bringing the action of detinue, when the jury may compel the restoration of the property by assessing the damages to its value. If, however, he brings *trover*, he can only recover damages to the actual extent of the injury he has sustained. The court, in effect, told the jury, that the measure of damages was not the injury actually sustained, but that assuming the title of the plaintiff to be a life estate only, they might find the *value* of the slave in damages.

Let the judgment be reversed, and the cause remanded.

ROBERTS v. BURKE.

1. Where a suit is commenced by attachment, the attachment is the initiatory process in the cause, and the defendant cannot, by demurring, bring its defects to the view of the court, or avail himself of a variance between it and the declaration; consequently a revising court will not look behind the declaration to ascertain whether the suit is brought for a less sum than the primary court could take jurisdiction of, unless the question was there regularly presented.

WRIT of error to the Circuit Court of Wilcox.

In January, 1842, the defendant in error caused an attachment to be issued by a justice of the peace of Wilcox, for the sum of thirty-seven 90-100 dollars against the estate of the plaintiff's, returnable to the circuit court. The declaration is for goods, wares and merchandize sold and delivered; work and labor done; money lent and advanced, &c.; money had and received; and an account stated. For each of these causes, the declaration charges an indebtedness of thirty-seven 90-100 dollars. The defendant demurred to the attachment and declaration, and his demurrer being overruled, he pleaded payment, non-assumpsit, and the statute of limitations. On these pleas, issues were joined, which were tried by a jury, who returned a verdict in favor of the plaintiff for the sum of forty-seven 74-100 dollars, and a judgment was rendered accordingly.

SELLERS, for the plaintiff in error.
DEAR, for the defendant.

COLLIER, C. J.—It is a settled principle in this court, that the defendant cannot, by a demurrer, object to the writ or initiatory process in a cause, whether the action be commenced by a *capias* or summons against the person, or an attachment against his estate. The demurrer, then, did not bring before the court the attachment in the present case, and the declaration being unquestionably good, it was properly overruled.

The statute of 1807 enacts, "If any suit shall be commenced in any court for a less sum than such court can legally take cog-

nizance of, or if any person shall demand a greater sum than is due, on purpose to evade this act, in either case, the plaintiff shall be non-suited, and pay costs: *Provided always*, that if the plaintiff, or any other person for him, will make an affidavit (to be filed in the clerk's office,) that the sum for which the suit shall be brought, is really due, but that want of proof, or that the time limited for the recovery of any article, bars a recovery, in that case, such plaintiff shall have a verdict and judgment for what appears to be legally proved, any thing to the contrary notwithstanding." In Cummings v. Edmundson, adm'r, [5 Porter's Rep. 145,] this court say the act cited "contemplates two distinct classes of cases, in one of which the court trying the cause has no discretion, but must non-suit the plaintiff; but in the other, it is not made obligatory so to proceed, unless it shall appear that a sum is demanded beyond what is due, *on purpose to evade the act*." In the case before us, the attachment and affidavit claim a less sum than the circuit court could legally take cognizance of; the defendant might, for this cause, have moved to non-suit the plaintiff, or the court of its own motion might have caused such a judgment to be entered. But it was competent for the defendant to waive all defects in the original process, or to dispense with it entirely; and such we think was the legal effect of the demurrer and pleas to the declaration. The attachment, then, being placed out of view, the several sums, expressed in the declaration, were sufficient in the aggregate to give the court jurisdiction, and prevent a non-suit under the statute.

This conclusion is not opposed by the familiar principle, that consent cannot give jurisdiction. That question does not arise in the posture in which this case is presented. The declaration we have seen, is unobjectionable, and by demurring, the defendant made it impossible for this court to look to the attachment.

The judgment must, therefore, be affirmed.

WALKER, ET AL. v. THE STATE.

1. W. enters into a recognizance with H. and as his surety, for his appearance at the next term of a Circuit court, to be held on the 4th Monday of March. Subsequently, the time of holding the court is changed to the first Monday in March, when the recognizance is estreated. *Held*, that the legal effect of the recognizance is to appear at the next court, and that it is not avoided by the change in the time of holding the court.

WRIT of error to the Circuit Court of St. Clair county.

Sci. fa. on a judgment *nisi* rendered on a forfeited recognisance. Walker entered into a recognizance with Wm. Hale, conditioned that the latter should appear at the then next term of the circuit court to be held for St. Clair county, on the 4th Monday of March. The legislature subsequently changed the time of holding that court, to the first Monday of March, on which day Hale was called on his recognizance, and failing to appear, it was forfeited, and judgment *nisi* rendered, which being made final, Walker prosecutes this writ of error, and assigns as error, the judgment as erroneous, and not warranted by the recognizance.

RICE, for the plaintiff in error.
THE ATTORNEY GENERAL, *contra.*

GOLDTHWAITE, J.—The legal affect of this recognizance is, that the party undertakes to render himself at the *next* term of the court. It cannot be tolerated that the public convenience shall be made to depend on stipulations of bail, nor public justice defeated upon the idea that the *time* of appearance is considered as essential in engagements of this description. We consider the recognizance as equally binding, whether the court is held on the day named, or its time of session is changed by competent authority, to any other day.

Judgment affirmed.

JOHNSON v. HANSON.

1. Upon a verbal contract for the sale of land, the vendor cannot maintain an action at law for the purchase money, although the vendee has paid a part of the price, and retains the possession of the land.

ERROR to the Circuit Court of Shelby county.

Assumpsit by the plaintiff, against the defendant in error.

The two first counts of the declaration, set out a sale of land by the plaintiff to the defendant, at the price of eight hundred dollars, to be paid, one half on the first of January, 1839, and the remainder on the 1st January, 1840—that the defendant went into peaceable possession of the premises, and has hitherto retained it, and that the defendant has paid three hundred dollars, part of the purchase money—that the plaintiff is able and willing, and ready to make title according to his contract, upon the payment by the defendant, of the purchase money, and concludes with the usual *super se assumpsit.*

The defendant demurred to these counts of the declaration, and judgment being rendered on the demurrer for the defendant, and the plaintiff declining to plead over, judgment was rendered against him.

The judgment of the court on the demurrer, is assigned for error.

BOWDON, for plaintiff in error, cited 4 Ala. Rep. 362; 13 Johns. 359; 14 id. 452; 2 Story's Equity, 62, 75; 3 Stewart, 207; 8 East, 308; 6 id. 602; 9 Mass. 510; 15 id. 85; 1 Vesey, 333; 2 Day, 222; 1 Binn. 450; 1 H. & M. 377; 4 id. 161.

MORRIS, *contra*, cited 1 S. & L. 123; 2 Johns. 223; 2 Story's Equity, 108.

ORMOND, J.—It is not, in general, necessary to allege in a declaration, a written promise, where the necessity for the promise being in writing, is created by statute, as it is matter of evidence to be proved at the trial. But in this case, it is expressly

alleged that the contract for the sale of the land, which was the consideration of the promise laid in the declaration, was merely verbal, and the precise question is, whether an action can be maintained at law, to recover the purchase money of land, there being no note or memorandum thereof in writing, because the vendee retains the possession.

A court of chancery acting on its own peculiar rules, will, in certain cases, for the prevention of fraud, enforce a specific performance of a verbal contract for the sale of land; as where there has been a part performance of the contract, but we are not aware that such a power has ever been acknowledged to reside in a court of law. Doubtless some isolated cases may be found, in which it has been held that the equitable circumstances which would authorise a court of chancery to grant relief, might be considered in a court of law.

Lord Redesdale remarks, "Mr Justice Buller says, in one or two cases, that past performance will take a case out of the statute, as well at law as in equity. This opinion will be found wrong; and I recollect Mr Justice Buller, on being pressed with the consequences of that opinion, in case of a demurrer to evidence, being obliged to abandon the position. The ground on which a court of equity goes in cases of part performance, is that sort of fraud which is cognizable in equity only." [O'Herliky v. Hedges, 1 S. & L. 130.]

So this court, in the case of Meredith v. Naish, [3 Stew't, 207,] intimated an opinion, that in a case circumstanced like the present, the vendor could recover. But these cases appear not to have been well considered; at least it is clear, the decisive current of authority is the other way.

In White v. Beard, [5 Porter, 100,] although this question was not distinctly presented, this court intimated an opinion, that the equitable right of the vendor acquired by part performance, was not a legal consideration for a note given for the purchase money after such performance. To the same effect is Howard v. Easton, [7 Johns. 205.] to which many other cases might be added.

The recent decision of Cope v. Williams, [4 Ala. 364,] has been pressed on the court, as tending to a contrary conclusion. In that case, the vendee in possession, brought an action to recover back the purchase money. This court held, that it was contra-

ry to equity and good conscience, to permit him to assert the invalidity of a contract, by virtue of which he retained the possession of the land; the vendor being willing to execute the contract.

The difference between that case and the present is, that here the vendee repudiates the contract, and if he retains the possession of the land, it is not by force of the contract, which at law can confer no rights on either party, but because the vendor chooses to acquiesce in it.

Whatever may be the rights of these parties in a court of equity, it is certain no right can be derived by either in a court of law, from a contract declared void by statute.

Let the judgment be affirmed.

TARVER'S EX'RS v. BOYKIN.

1. Where an action of assumpsit is brought against the payee, as indorser of a promissory note, payable at bank, and the defendant pleads the general issue, it is only necessary for the plaintiff to produce the note declared on with the payee's indorsement, prove that it was duly presented at the place appointed for its payment, show its non-payment, and that the defendants were seasonably advised thereof by notice given personally, or through the medium of the post-office.
2. Where defendants, sued as executors, plead *ne unques executors*, it is enough for the plaintiff to show on the trial of the issue, that they had received letters testamentary under a grant thereof by the county court, in order to throw upon the defendants the *onus* of sustaining their plea.
3. A promissory note, payable in bank, is, by the statute, governed by the rules of the law merchant, as to days of grace, &c.

WRIT of error to the Circuit Court of Russell.

This was an action of assumpsit on a promissory note, made by Douglass & Clark, on the 14th March, 1840, by which they promised to pay to the order of the testator the sum of twenty-eight hundred and thirteen 64-100 dollars, on the first day of January next thereafter, at the bank of Columbus. The declaration avers the endorsement of the note by the testator, in his

lifetime, to the plaintiff below, its presentment to the bank for payment on the fourth day of January, 1841, its non-payment by the bank or the plaintiff, and a notice thereof to the latter, &c. The defendants pleaded—1. Non-assumpsit; 2. *Ne unques* executors: and the cause was tried on issues to these pleas. The plaintiff read to the jury the note with the indorsement of the testator, as set forth in the declaration. He also proved by a notary public; that he did, on the fourth of January, 1841, present the note at the bank of Columbus for payment, which was refused; whereupon, he (the notary) gave notice to the defendants of the non-payment, by the first mail, addressed to them at Gerard, Russell county, Alabama. The notary also proved that, that was the nearest post office to the defendants' residence. The plaintiff then produced a certified transcript of the record of the county court of Russell, showing the probate of the last will and testament of Benjamin P. Tarver, dec'd, and an order for the issuance of letters testamentary thereon to the defendants. He also adduced the letters testamentary, which issued according to the order; and further, proved the rate of interest in the State of Georgia. To this evidence there was a demurrer by the defendants, which was overruled by the court; and the damages being uncertain, a writ of inquiry was awarded, the damages ascertained by a jury, and a judgment rendered upon the verdict, with costs, to be levied of the goods and chattels of the testator in the defendants' hands, &c.

N. Harris, for the plaintiffs in error.
J. Cochran, for the defendant.

COLLIER, C. J.—This cause was submitted without brief or argument indicating the legal questions proposed to be raised; and we are at loss to perceive even the semblance of error in the judgment of the circuit court. To disprove the first plea, it was only necessary for the plaintiff to produce the note declared on, with the indorsement of the payee, and to show that it was duly presented at the place appointed for its payment, prove its non-payment, and that the defendants were seasonably advised thereof, either by personal notice or through the medium of the post office. Upon the second plea, it was not necessary to show more, than, that the defendants had received letters testa-

mentary under a grant thereof by the county court of Russell. If they failed to qualify, by executing a bond and taking the oaths prescribed, or having taken upon themselves the trust, they afterwards resigned it, they should have shown the fact, and the court could not, upon their demurrer, have intended it. The fair inference, from the manner in which the evidence is recited, is, that the testator's will was proved at the instance of the defendants, and that they took upon themselves its execution. The second and third sections of the act of 1821, expressly enacts, that before letters testamentary or of administration shall be granted, or issued, the executor or administrator shall take an oath and execute a bond for the faithful performance of his duties according to law. The grant of letters testamentary supposes that all the prerequisites have been complied with; and having received them, an executor would not be permitted to repudiate the trust by showing that they were prematurely issued.

In respect to the fact that the note was not presented for payment until the fourth day of January, it may be remarked, that even if it were doubtful whether it is such a paper as is entitled to days of grace according to the principles of mercantile law, it can be no longer a matter of doubt in this State. The act of 1828 provides, "that hereafter the remedy on bills of exchange, foreign and inland, and on promissory notes payable in bank, shall be governed by the rules of the law-merchant as to days of grace, protest and notice."

As to the statement in the demurrer, that the plaintiff proved the rate of interest in Georgia, without proof that the note was there made, it is a point wholly immaterial; for, independent of that recital, the evidence is sufficient to show the plaintiff's right to recover. The jury ascertained the damages, and we must suppose that they had ample evidence before them to show where the note was made.

The notice of non-payment was strictly correct. The judgment of the circuit court is unobjectionable in point of law, and is consequently affirmed.

DESHA, SHEPPARD & CO. v. SCALES.

1. In a claim to property levied on, where the deed under which the claimant makes title, is set out in his plea, and the replication is, that if any such deed exists, it is not valid in law; such a replication, in a claim cause, does not admit the execution of, or dispense with proof of the deed.
2. Where a deed conveys slaves to one, who by his own note has become liable for the benefit of the grantor in the deed, and the note is held past due by a bank, a stipulation, that the grantee may sell the slaves, to answer any default by the grantor, from time to time, to meet the payments required by the bank, of the grantee, is to be construed as an agreement that the slaves shall remain in the possession of the grantor until such default: and the fact that they so remain, is no badge of fraud.

Writ of error to the Circuit Court of Talladega county.

Claim of property by Joseph H. Scales to six slaves, levied on by virtue of an attachment in favor or Desha, Sheppard & Co. against Nicholas Scales.

The pleadings are not in the customary form, and in order to a correct understanding of some of the questions raised, require to be stated.

The plaintiffs allege that the slaves levied on, were the slaves of Nicholas Scales, and subject to their attachment, concluding with a verification.

The claimant averred that the slaves so levied on, are not liable absolutely to said attachment, as is by the plaintiff alleged, but on the contrary thereof, he avers that he holds them under and by virtue of a trust deed, executed by the defendant in the attachment on the 21st October, 1840, to the said claimant, whereby the said Nicholas conveyed to the said claimant the said slaves in trust, as is therein specified; by which deed said claimant was authorized, as soon and as often as the said Nicholas should fail to pay punctually all such sums of money as might be required of the said Joseph H. Scales, together with interest from time to time, by the bank of the State of Tennessee at Nashville, due upon a note, dated —— day of August, 1839, drawn by the said Joseph H. Scales, payable to Robert Scales, at the bank of the State of Tennessee, at Nashville, for the sum of three thousand

dollars, due at six months after date; which note is endorsed by Robert Scales and James W. Perkins; and which was discounted by the said bank, and the proceeds paid to the said Nicholas Scales. Claimant avers that said deed has been duly recorded; was made to secure and save harmless the said Joseph H. Scales, in consideration of his liability; and that the same has not been satisfied or discharged by the said Nicholas Scales: and this the said claimant is ready to verify, &c.

The plaintiffs replied, that they ought not to be precluded from the condemnation of the said slaves, by reason of any thing alleged by the claimant, because they say that the said trust deed, if any existed, is not valid in law; but the same, as to these plaintiffs, who are creditors, is fraudulent and void.

At the trial, upon the issue thus made, the claimant introduced a deed, dated 21st October, 1840, executed by Nicholas Scales to Joseph H. Scales, purporting to convey to him the slaves in controversy. This deed contains a recital, that Joseph H. Scales, about the 16th day of August, 1839, at the request of Nicholas, executed his note, payable to Robert Scales, at the bank of the State of Tennessee, at Nashville, for 3,000 dollars, due six months after date; which note was endorsed by Robert Scales and J. W. Perkins, and discounted by said bank, the proceeds being delivered to said Nicholas, he receiving the money for his own use. And being desirous to indemnify and save harmless, the said Joseph, for that consideration, and the further sum of one dollar, has, by the said deed, conveyed the said slaves to said Joseph H., to have and to hold, receive and take into possession of him, the said Joseph H., to the only proper use, benefit and behoof of him, the said Joseph H., his heirs and assigns. In trust, however, and to the intent and purpose, that he, the said Joseph H., may, as soon and as often as the said Nicholas may fail to pay punctually all such sums of money as may be required of the said Joseph H., together with the interest, &c, from time to time, by the bank aforesaid, until the said debt shall be fully paid and discharged, to the said Joseph H. by the said Nicholas, sell and dispose of the property herein conveyed, or so much thereof as shall be sufficient to pay off the said debt and interest, &c., according to the amount or amounts which may be called for by the bank from time to time; to sell to the highest bidder for cash, by giving 20 days' public notice.

At the foot of the deed is an acceptance of the trust by Joseph H., and upon it is endorsed the certificate of the clerk of the county court of Talladega county, that Nicholas Scales acknowledged before him, that he signed, sealed and delivered the foregoing deed to the person therein named on the day that it bears date. This certificate is of the same date as the deed. There is also endorsed upon it, the certificate of the clerk, that it was received for record on that day, and that it is recorded in his office.

The plaintiff objected to reading the deed—1st, because there was no proof of its execution; 2d, because the certificate of the clerk was informal. The objections were overruled, and the deed allowed to be read without proof of its execution, other than the certificates endorsed upon it.

The claimant offered to read the deposition of a witness, to which the plaintiffs objected, on the ground that it was brought into court by the claimant himself. It was shown by his oath, that he had himself received the deposition from the commissioner, sealed up, and that it had undergone no alteration, erasure or addition since its receipt from the commissioners. This objection was overruled.

This deposition was also objected to, on the ground that the affidavit, upon which the commission issued, was insufficient; and because the commissioner does not properly certify the deposition. The affidavit is made by the attorney of the claimant, who states that he is advised, and verily believes, and, therefore, deposes, that the witness resides out of the State, to wit, in Tennessee, and that he will be material for the claimant. The certificate of the commissioner is in the usual form, except that in the caption of the certificate, the commission is stated to have been issued from the circuit court of —— county, in the State of Alabama.

This deposition declared, that the note executed by Joseph H. Scales in August, 1839, was renewed, from time to time, by the same parties, until reduced to 500 dollars, which sum was due when the deposition was taken. The witness did not know who paid the renewal, except one of 200 on a 700 dollar note. That was paid by Robert Scales.

The plaintiffs proved that Nicholas Scales had retained the

possession of the slaves from the execution of the deed until the levy.

On this state of proof, the plaintiffs requested the court to charge the jury, that if the note, in the trust deed mentioned, was paid off and discharged before the levy, they should subject the property. This charge was given, with the qualification, that if a security paid the debt or the note, or the trust deed mentioned was extended, the deed still subsisted.

The court charged the jury, that the legal construction of this deed authorized Nicholas Scales to retain possession of the property; and that such retention, though unexplained, is no evidence of fraud or unfairness.

The plaintiffs excepted to the ruling of the court in these several matters; and the same are now assigned as error.

W. P. Chilton, for the plaintiffs in error, submitted the following points:

1. The deed should have been established by proof. [Bradford v. Dawson, 2 Ala. Rep. 208.] Nor is this rendered unnecessary by the allegation that the deed, if it existed, was fraudulent. [1 Mass. 71; 1 Wash. 325; Ross v. Gould, 5 Greenl. 204.]

2. The certificate of registration does not pursue the statute. [Clay's Dig. 153, § 7.]

3. The charge of the court upon the construction of the deed was incorrect. By the retention of the property, the grantor acquires a fictitious credit. The deed provides the possession shall enure to the use of the vendee; it is, therefore, inconsistent that it should remain with the vendor.

4. But if the retention is consistent with the deed previous to a default, afterwards it is a badge of fraud. [Randall v. Cook, 17 Wend. 53.]

5. The statute only gives the right to *improve* testimony by *interrogatories*. [Clay's Digest, 165, § 3.] When the evidence is taken in the first instance, it should be by deposition, and the oath cannot be made by attorney.

Bowdon, *contra*, argued—

1. That it is immaterial which is first in order, the reading or proof of the deed; and the party had the right to introduce his

proof in his own way. [3 Ala. Rep. 543, 371; 1 ib. N. S. 83.] The execution of the deed, however, is admitted by the pleadings. [1 Phil. E. 170; 2 ib. 444, note 331; Greenl. Ev. 33; 1 Chitty's Plead. 605.]

2. The deed was properly registered. [2 Ala. Rep. 203.]

GOLDTHWAITE, J.—Without entering into a consideration of the antiquated learning, with respect to the effect of a *protestando* in pleading, we shall confine ourselves to the expression of our opinion, that this issue must be considered as involving an inquiry into the execution of the deed. The issue itself is irregular, and more circumscribed than it should have been, inasmuch as the plaintiff in execution is only bound to show that the property levied on was subject, either in whole or in part, at the time of the levy. The claimant only puts in issue his right of property under the deed, when, from our previous decisions, it is well settled, that the interest remaining in the defendant in execution, until the property is taken out of his possession under the deed, is the subject of levy and sale. [Planters' and Merchants' Bank v. Will s, 5 Ala. Rep. 770.] But conceding the issue here to be upon the right existing under the deed, we think the plaintiff's replication cannot be construed as an admission of the execution. In our opinion, it was incumbent on the claimant to prove his deed, and in this view, the case is directly within the decisions of Bradford v. Dawson, [2 Ala. Rep. 203,] Ravises v. Alston, [5 ib. 297.] It is urged, however, that the whole proof does not appear in the bill of exceptions, and as the party could read the deed, or prove it first, according to his pleasure, we ought to intend that it was subsequently proved. The rule is, we believe, to prove a written instrument when offered as evidence, before reading it.—Our conclusion is, that the deed was improperly admitted upon the certificates of registration.

2. The deed does not specify with whom the possession of the property is to be, until the default upon which a sale is permitted; but we think the legal inference is, that the parties intended it should remain with the grantor until he should be in default by suffering the call of the bank for payment, to remain unsatisfied. This was the construction given by the circuit court, and it seems entirely free from error.

3. The other questions, if they are material to be settled, seem

to be concluded by the case of Bradford v. Dawson, before cited, and by the statutes prescribing the manner of taking depositions.

Judgment reversed, and cause remanded.

HENDERSON v. HENRY.

1. A confession of judgment, by the defendant, of part of the plaintiff's demand, and a continuance of the residue, on his motion, is a consent on his part, to a severance of the claim, and it cannot afterwards be objected by him, on error, that two final judgments were rendered in the same cause.

ERROR to the Circuit Court of Butler county.

Debt by defendant in error, against plaintiff in error, on a promissory note for $580 39.

At a subsequent term of the court, the defendant confessed judgment for six hundred and thirty-nine dollars, for which sum and costs, judgment was rendered in favor of the plaintiff, and for the sum of one hundred dollars, the amount remaining due and not confessed, the cause, on the application of the defendant, was continued. At the ensuing term, a judgment was rendered for the plaintiff for $104. From this judgment, this writ is prosecuted.

The defendant assigns for error—the court rendered two judgments upon the same cause of action.

BLOUNT, for plaintiff in error, submitted the cause.

ORMOND, J.—It would certainly be irregular to render judgment final for that portion of the plaintiff's demand, which the defendant, by his plea, had omitted to answer. In such a case the final judgment must be suspended until the whole demand of the plaintiff is ascertained, for which judgment should be rendered, and one judgment be rendered for the entire amount.

This case does not come within this rule. The confession of judgment by the plaintiff in error, for part of the plaintiff's demand, must be considered as a consent to sever the amount so admitted to be due from the residue of the plaintiff's demand, and was doubtless made to enable him to contest the right of the plaintiff to the residue, as the record shows, that on his motion the cause, as to the residue, was continued. If this effect is not given to it, the confession of judgment by the defendant, did not avail the plaintiff any thing.

In addition, it may be remarked, that the judgment so confessed, is not brought up by the writ of error, and in the final judgment, unconnected with it, there is certainly no error.

Let the judgment be affirmed.

DARDEN'S Adm'r, et al. v. BURNS' Adm'r, and another.

1. The purchaser of personal peoperty may file a bill in the nature of a bill of interpleader, against his vendor and a third person who claims a right to the same, or seeks to avoid the vendee's title, and pray the decree of the court upon the conflicting claims, that he may be secure in the payment of the purchase money.
2. Where a testator, after specially bequeathiug slaves and other personal property to his daughters, declared his meaning to be, that they should "inherit the above bequests, and if no lawful heirs of their bodies, then to revert to the family or estate:" *Held*, that the limitation was wholly indefinite, reaching to the remotest descendants of the first takers, and being uncontrolled by any thing which preceded or followed it, the daughters took an absolute estate.

Writ of error to the Court of Chancery for the county of Benton.

In July, 1842, the plaintiffs in error, who are, Benjamin Mattison, adm'r of Lemuel G. Darden, dec'd, James H. Harris, Richard Sawyer, Jesse G. Cobb and John Goodin, filed their bill against James L. Simmons, adm'r of Wm. Burns, dec'd, and Mary McGraw. The case stated in the bill, so far as it is ne-

cessary to notice it, is substantially as follows, viz: on the ninth of December, 1790, Benjamin Averitt made his last will and testament, in which are the following bequests and explanatory clause: "I give to my daughter Isabella, one negro girl, named Jinney, also one young mare and two cows. Also, my daughter Mary, I give one negro girl named Hagar, one mare and two colts, also one cow. My meaning is, the heirs of my daughters above named, are to inherit the above bequests, and if no lawful heirs of their bodies then to revert to the family or estate." This will was admitted to probate shortly after its date, in the District of Richland, in the State of South Carolina.

The testator's daughter, Isabella, intermarried with Burns, the intestate of the defendant Price, and died without issue of her body, in the lifetime of her husband; shortly after, Burns died intestate in the county of Benton, and under an order of the orphans' court of that county, his administrator sold the woman Jinney, (who was bequeathed by the will of Benjamin Averitt, to his daughter) and her children and grand children. At that sale, the intestate of Mattison, and each of the other complainants, became the purchaser in his several right of one or more of the offspring of Jinney, and executed their writings obligatory for the amount of their respective purchases, payable to the administrator of Burns. It is further stated, that the defendant, Mary McGraw, is the only heir of Mrs Burns, and claims the slaves in question under the will of her father—she being also a daughter of Benjamin Averitt, dec'd, and his only surviving child. The obligations of the complainants have matured, and suits been commenced on them in the county court of Benton; and the money due from the complainants respectively, they propose to bring into court to be paid over to whoever shall be adjudged, upon final hearing, to be entitled to it. The bill prays that injunctions may be awarded to restrain the administrator of Burns from proceeding in his actions at law, and that the administrator and Mrs McGraw, may be required to interplead and test their right to the slaves purchased by the complainants, or the money due on their obligations; and for further relief.

To prevent the objection to the bill, of multifariousness, it is agreed by the defendants, that all the complainants may join in the prosecution of the suit. An injunction was awarded, but afterwards, and before the answers came in, the defendants moved

to dismiss the bill for want of equity: and the chancellor being of opinion that the case stated was not such as authorised the court to require the defendants to interplead, and that complainants might litigate the administrator's title to the slaves in the actions pending at law, dismissed the bill at their costs-

Wm. P. Chilton and Bowdon, for the plaintiffs in error. A bill of interpleader may be properly filed where the complainant claims no relief from either of the defendants, but only asks the court to determine which of two or more parties is entitled to money or property which he owes, or has in his hands. &c. [Bedell v. Hoffman, 2 Paige's Rep. 199.] Such a bill may be filed, although the complainant has not been sued at law, or has been sued only by one of the parties; or though the claim of one of the parties is actionable at law, and the other in chancery. [Richards v. Salter, 6 Johns. Ch. Rep. 445]. It is a question of law of some difficuty, whether Mrs Burns took the absolute estate under her father's will, depending upon the laws of South Carolina, or rather upon what they were in 1790. This question the complainants, or their counsel, cannot determine without jeoparding their interest, and think they may require a court of chancery to decide for them. [Atkinson v. Monk, 1 Cow. Rep. 691; Nash v. Smith, 6 Conn. Rep. 421.]

W. B. Martin, for the defendant.

COLLIER, C. J.—It is needless to inquire whether the case made by the complainant, is proper for a bill of interpleader, technically so called, [Story's Eq. Plead. 237, 241,] as there are many cases where a bill in the nature of a bill of interpleader, will lie by a party in interest, to ascertain and establish his own rights, where there are other conflicting rights between third persons. Thus a purchaser may file a bill in the nature of a bill of interpleader against the vendor or his assignee, and any creditor who seeks to avoid the title of the assignee, and pray the direction of the court, as to whom the purchase money shall be paid. So if a mortgagor wishes to redeem the mortgaged estate, and there are conflicting claims between third persons as to their title to the purchase money, he may bring them before the court to ascertain their rights, and to have a decree for a redemption, so that he

may make a secure payment to the party entitled to the money. In these cases the plaintiff seeks relief for himself; but in a bill of interpleader, he only asks that he may be at liberty to pay the money, or deliver the property to whom it of right belongs, and be thus protected against the claims of both. In the latter case, the only decree to which the plaintiff is entitled, is, that he be permitted to bring the money, or property, into court, and have his costs; and that the defendants interplead and settle their conflicting claims—*Ibid.*

The material question to be considered, is, whether the complainants, in order to their own protection, require the relief which they have sought? It is a settled rule of law, that the limitation of personal property, by words which would create an estate tail, if applied to lands, will have the effect to vest the absolute interest in the first taker; because such property cannot be entailed.—[Fearne on Rem. 463; 2 Roper on Legacies, 393, and cases cited by these authors. See also, Moffat's ex'rs v. Strong, 10 Johns. Rep. 11; Patterson v. Ellis, 11 Wend. Rep. 259; Bell and wife v. Hogan, 1 Stewart's Rep. 536; McGraw v. Davenport and wife, 6 Porter's Rep. 319.] Such being the rule, the question is, whether the will of Benjamin Averett did not vest in his daughter, Isabella, an absolute property in the slave Jinney. This question may be easily answered by a reference to the adjudged cases, which are numerous and direct. In Saunders v. Hyatt, [1 Hawks' Rep. 247,] the testator devised to his son a plantation, and lands adjoining, with a limitation as follows, "and if he dies without any lawfully begotten heir of his body, then to his brothers and sisters." The court were of opinion that the word "heir," meant "issue," and would embrace remote lineal descendants of the son, who might come into being long after his death, and would create an estate tail.

The words "heirs of the body," and "dying without issue," will create an estate tail, unless they are restricted by some expression indicative of an intention that the first estate should cease on the first takers dying without issue at the time of his death. [Ld. Raym. Rep. 1561; 1 East's Rep. 264; 7 T. Rep. 531; 11 East's Rep. 668; 2 Bos. & Pul. Rep, 485; 4 Har. and McH. Rep. 393; 1 Wash. Rep. 71; 1 Call's Rep. 187; 3 id. 297; 4 Hals. Rep. 10.]

In Keating and wife v. Reynolds, [1 Bay's Rep. 80,] the testator bequeathed to his two daughters, slaves and other personal

property, and provided, that if they "should die without having a lawful heir to their body, to live, then and in that case, the said slaves, &c. to be equally divided to the survivors." The court said, "in the present case it is true that the words "heir of the body," are mentioned; and if they stood alone, and unqualified by any other words explanatory of the testator's intention, they would create an estate tail; consequently, the limitation would be too remote. But the words "to live," immediately following the foregoing words "heirs of her body," show that his idea was, children living at her death; and the limitation over upon the contingency of her leaving no children, to the survivor, is a sufficient description of the person he meant to take, so as to bring this case within the rules of law, in support of the limitation."—[See also, 1 Johns. Rep. 451; 10 id. 11; 11 id. 348; 16 id. 382; 2 Serg't & R. Rep. 59; 1 Bay's Rep. 453.] So, in Guery v. Vernon, [1 Nott & McC. Rep. 69,] the will contained the following clause: "I give unto my daughter, Florida Guery, two negro girls, and their increase, but in case my said daughter, Florida Guery, should die without heirs of her body, then the said negro girls to return to my son." The court thought that the words "heirs of her body," were not words of purchase, and that the limitation was too remote to take effect in favor of the son. Where slaves were given to a daughter by a deed poll, "and at her death to the heirs of her body;" it was held, that as they were unrestricted by other terms used in connection with them, they must be construed as words of limitation, and not of purchase. [1 Bay's Rep. 453.]

In McGraw v. Davenport and wife, [6 Porter's Rep. 327,] this court said, all the cases agree, that the words "die without issue," when used in a will as a limitation over of personal property, unexplained or controlled by any other circumstance, or language in the will indicating a different intention, do import an indefinite failure of issue. Their effect, when unrestricted, is to vest the entire property in the first taker. These citations very clearly indicate what the rule of law is, upon the question before us. The testator bequeaths slaves and other personal property to two daughters, and declares his meaning to be, that they shall "inherit the above bequests, and if no lawful heirs of their bodies, then to revert to the family or estate." The generality of the terms in which the intention is expressed, is uncontrolled by any thing which precedes or follows the clause. It is not attempted

to limit the failure of heirs to the death of the daughters, or to any particularly defined period in the future—it is wholly indefinite, and the limitation reaches to the remotest descendants of the first takers. The cases cited all show, that such a limitation cannot be sustained; and none are more directly in point than the cases which have been decided by the highest courts of South Carolina. The consequence is, that Mrs. Burns took an absolute estate in Jinney and her offspring—that being in possession (as it may be inferred from the bill) the property passed to her husband, and of consequence, vested in his representatives for the purposes of administration.

It is not alleged that the laws of South Carolina, (in which State the will in question was made) are, or were variant from the common law which we here recognize as the rule of decision; and we must in the absence of such allegation, intend that they are similar to our own. [Mims v. The Central Bank of Georgia, 2 Ala. Rep. N. S. 294.]

We have only to add that the decree is affirmed, with costs.

MARLER, ADM'X, v. MARLER.

1. When slaves, belonging to a mother. are permitted by her to remain in the possession of a son, he recognizing her title, for more than three years, and he dies in possession, but insolvent; his administratrix cannot recover the slaves in detinue from the mother, who subsequent to the grant of administration on her son's estate, has regained the possession; the administratrix does not represent the creditors who might, under the statute of frauds, be entitled to have satisfaction of their debts out of the slaves.

WRIT of error to the Circuit Court of Montgomery county.

Action of detinue, by the administratrix of Aminidab Marler, to recover certain slaves.

At the trial, on the general issue, it was proved on the part of the plaintiff, that the slaves sued for were in her intestate's pos-

session at the time of his death, and had remained in his possession for more than six years next before his death. That shortly after the grant of administration to the plaintiff, the slaves were taken from the plantation of her intestate by an agent of the defendant, who refused to deliver them on demand. The plaintiff also proved, that the estate of her intestate had been represented by her as insolvent, and so decreed by the competent authority.

The defendant then proved, that she was the mother of the plaintiff's intestate, and that he had frequently admitted and declared the slaves were her property, and did not belong to him.

On this state of proof, the plaintiff requested the court to instruct the jury, that if her intestate had been proved to have had possession of the slaves for three years, under a loan, or any other reservation or limitation, without demand made and pursued by due course of law by the defendant; or without such loan, reservation or limitation of the slaves was by will, or by deed in writing, duly acknowledged or proved, by one or more witnesses, in the circuit or county court of the county where one of the parties, the grantor or grantee, lived, within twelve months after the execution thereof, and recorded in the county where the property was situated; and, also, that the estate of her intestate had been represented and decreed to be insolvent, then the plaintiff was entitled to recover. This the court refused; and instructed the jury, that the plaintiff was not entitled to recover if the jury should believe the slaves were the property of the defendant, although they had remained in the intestate's possession for more than three years.

This refusal and charge was excepted to, and is now assigned as error.

Harris, for the plaintiff in error, urged, that if the administratrix could not recover under these circumstances, that creditors could never reach the slaves, although they were clearly entitled to them in satisfaction of debts.

The insolvency of the estate was a bar to these suits, and without execution against the estate of the intestate, they could have no pretence to go into equity.

Hayne, *contra*, insisted that if there was a loan or reservation, it was good as between the parties and their personal representatives. [Osborne v. Moss, 7 John. 160; Chappel v.

Brown, 1 Bailey, 528; 3 Hayw. 252; Gillespie v. Gillespie, 2 Bibb, 91; Dale v. Harrison, 4 ib. 65; Stewart v. Dailey, Lit. Sel. C. 212.]

The creditors can go into equity if they cannot reach the assets at law. [Chappel v. Brown, 1 Bailey, 528.]

GOLDTHWAITE, J.—Our statute of frauds does not avoid loans, reservations or limitations of personal property, however secret, as between the parties themselves or their representatives, but only as to creditors and purchasers of the person remaining in possession of the property for the space of three years; and not then, if the loan is evidenced by deed or will, recorded as prescribed. [Clay's Digest, 254, § 2.]

This, indeed, is conceded to be the general effect of the statute; but it is insisted, whenever an estate is decreed to be insolvent, that then the administrator is entitled to hold, or reduce into possession, any property which a creditor could resort to for satisfaction of his demand. And it is further urged, that if the administrator cannot thus proceed, the creditor will be remediless, as, by reason of the insolvency, he can procure no execution to levy on the property.

In the present case, there seems to have been no question raised as to the *bona fides* of the transactions between the defendant and the plaintiff's intestate; but we may remark, that even if there had existed a fraudulent intent in fact, as well as in law, it seems to be well settled that a personal representative is bound by the act of his testator or intestate. [Gillespie v. Gillespie, 2 Bibb, 89; Stewart v. Dailey, Litt. S. C. 212; Osborne v. Moss, 7 John, 161; Hawes v. Leider, Cro. Jas. 270; Yelv. S. C. 196; Steele v. Brown, 1 Taunt. 381; Reichert v. Castator, 5 Binn. 109; Densler v. Edwards, January Term, '43.] However this may be, we are aware of no rule which permits a personal representative ever to change his character, and to become the representative of a creditor. Indeed, there is no reason why he should do so, for the creditor has ample remedies which he may use at will. Without undertaking, at this time, to decide whether a creditor, whose rights have attached under the statute of frauds, can or cannot sue one who takes possession of property liable to the payment of his debt, as an *executor de son tort*, we may remark that, if he was remediless at law, this, of itself, would

be a sufficient reason why the property liable for his debts should be reached in equity.

The case of Boyd and Swepson v. Stainback, [5 Munf. 305,] was one, where a creditor, suing on behalf of himself and others, was permitted to subject slaves, which had remained in his debtor's possession for such a length of time as created the legal presumption of a fraudulent trust, and this after the death of the debtor, and after the slaves had been retaken by the lender.

We think the refusal to give the charge requested, was proper; and the one given seems to be unexceptionable.

Judgment affirmed.

GARY v. McCOWN.

1. A sheriff who takes insufficient security upon a forth-coming bond, cannot be proceeded against by motion, but the party aggrieved thereby must seek redress, by action at common law.

Error to the Circuit Court of Sumter.

This was a suggestion by the defendant in error, that the plaintiff in error, sheriff of Sumter county, could have made the money on an execution which issued in favor of the defendant in error by due diligence.

From a bill of exceptions taken in the cause, it appears that the plaintiff in the suggestion had obtained a judgment against one Ryan, on which an execution issued, which was levied by the sheriff on certain property, and a forthcoming bond taken for its delivery. The forthcoming bond was returned forfeited, and an execution issued thereon against the defendants and the surety to the forthcoming bond. This execution the sheriff returned, "No property found;" and upon this execution the suggestion was made.

The plaintiff, having proved these facts, rested his case; and the sheriff declining to offer any testimony, the court charged

the jury, that the sheriff, having once levied on property sufficient to satisfy the execution, was bound to take undoubted security, and had the unrestrained right to judge of it; and if he took insufficient security, and suffered the property to go out of his hands, that would be such a want of diligence as to make him liable on the execution issued upon the forfeited bond.

To this the defendant excepted; and now assigns it for error.

INGE, for the plaintiff in error.
SMITH, *contra.*

ORMOND, J.—The charge of the court asserts, in effect, that where the surety upon a forthcoming bond proves insufficient, it is conclusive evidence against the sheriff that the money could have been made on the first execution by proper diligence.

The statute, [Clay's Digest, 215, § 74,] requires the sheriff to return the property, levied on by virtue of an execution, to the defendant, upon his executing a bond, with *good and sufficient security*, for the delivery of the property on the day of sale. The sheriff is, from the necessity of the case, made the judge of the sufficiency of the surety tendered; but it, by no means, follows, that he is responsible, at all events, to the plaintiff in execution if the surety proves insufficient. He may show that the surety, when received by him, was considered "good and sufficient," in the community in which he lived, for the debt he became bound for; and that, therefore, he had no right to refuse to receive him. The doctrine contended for, would convert the sheriff into an insurer, and make him, in effect, the surety of every "security" he received upon a delivery bond, If this were so, it would legitimately follow, that he must be the exclusive judge of the ability of the surety tendered, and might reject the most unquestionable security which could be offered. This would be utterly subversive of the rights of the defendant in execution, and would, in effect, be a virtual repeal of the statute requiring forthcoming bonds to be executed.

This view shows very satisfactorily, that the conclusion which the court required the jury to draw of want of diligence, from the fact of the insufficiency of the surety upon the forthcoming bond, was erroneous.

As the cause must be remanded, it is proper to inquire whether this motion can be maintained upon the facts disclosed.

The statute, under which this proceeding is had, [Clay's Dig. 218, § 85,] was evidently intended for those cases where the defendant in execution had property in possession which the sheriff omitted to subject to sale under the execution. The suggestion is, that the "money could have been made by the sheriff by due diligence." Can the inability of the surety to the forthcoming bond to pay, and the failure of the sheriff to collect the money from that cause, be attributed to a want of diligence on his part? To give this construction to the act, would not accord with the natural import of the language employed; nor would it be within the mischief which the act evidently intended to provide a remedy for, which was the omission to levy on property subject to the execution.

It never could have been presumed, that the sheriff would wantonly, and for the mere purpose of delaying the collection of the judgment, knowingly take insufficient surety to a forthcoming bond. The facts, in such cases, are, generally, if not always, that the sheriff acts upon insufficient, or incorrect information, and, in the hurry of business, does not make such inquiry as would have led to a knowledge of the condition of the surety. At all events, it was not considered by the Legislature such a flagrant dereliction of duty as to require the infliction of a summary penalty, as in the other cases provided by statute.

If a forthcoming bond is quashed for any defect which prevents its being operative as a statute bond, the sheriff is merely responsible to the party injured for damages. [Clay's Dig. 214, § 70.] And yet this would be a case in which the failure of the sheriff to make the money, on the first execution, would be much more owing to his negligence, than where he took insufficient security; and yet no summary remedy is given. We conclude, therefore, that none was intended to be given in such a case as the present; but the party was left to the more tardy, but equally certain redress afforded by the common law.

Let the judgment be reversed, and the cause be remanded.

FLEMING, LINN & CO. v. BURGE.

1. The defendant in attachment cannot object, on error, unless the point has been regularly made in the primary court, that the bond executed by the plaintiff is defective, although the record does not show that the defendant had actual notice of the pendency of the suit previous to judgment.
2. The affidavit of a plaintiff in attachment need not disclose the cause, or evidence of defendant's indebtedness, whether by bond, note, &c.; the statute merely requires him to "swear to the amount of the sum due."
3. In an attachment against a non-resident debtor, no publication is necessary, where a judgment is not rendered until more than six months after the suit was commenced.
4. A writing, acknowledging that there is due from the subscriber to the person therein named, a certain sum of money, and stating for what cause it is due, is a promissory note, and a final judgment, by default, may be thereon rendered.
5. The sheriff's return to an attachment, stating that he had levied the same on four horses, (describing their colors,) *as the property of the defendant*, is sufficient.

WRIT of error to the Circuit Court of Chambers.

This was an action commenced by attachment on the 10th of August, 1842, returnable to the circuit court on the second Monday after the fourth Monday of September next succeeding its teste, at the suit of the defendant in error against the plaintiffs. The plaintiff below declared on an instrument in writing, dated on the first day of June, 1842, by which the defendants acknowledged to be due to the plaintiff by them, the sum of one hundred and twenty-four 88-100 dollars, for keeping stage horses, which were then in their possession. The ground upon which the attachment issued, was the non-residence of the defendants, and the form of action, as characterized by the declaration, is assumpsit. At the term of the circuit court holden in April, 1843, a judgment by default was rendered against the defendant.

REESE, for the plaintiffs in error, made the following points:— 1. The bond executed by the plaintiff previous to suing out the attachment, does not conform to the statute. 2. The affidavit does not show whether the debt was due by bill, bond, note or

otherwise. 3. No notice was given to the defendants of the pendency of the attachment. 4. The writing declared on does not authorize a final judgment by default, nor does it amount to a promise by the defendants to pay money. 5. It does not appear that the property levied on belonged to the defendants.

Baugh, for the defendant.

COLLIER, C. J.—1. It is not allowable to object on error, that the bond executed by the plaintiff in attachment is defective. If the defendant thinks proper to make such an objection in the primary court, it will be there entertained, yet the suit will not be dismissed, unless the plaintiff declines executing a sufficient bond. [Lowry v. Stowe, 7 Porter's Rep. 483; Alford v. Johnson, 9 Porter's Rep. 320; Scott v. Macy, et al. 3 Ala. Rep. 250.] The rule of law upon this point cannot be otherwise, although the record does not show that the defendant had actual notice of the pendency of the suit previous to judgment. If the defectiveness of the bond could be presented to this court for the first time, and the judgment for that cause reversed, the defendant would not only be subjected to delay, but would be burthened with costs, which might have been avoided if the defendant had appeared in the circuit court; and when, too, the plaintiff most probably was pursuing the appropriate remedy for the recovery of a just demand. The injustice which would result from tolerating such a course of procedure, is quite sufficient to show that the first point made cannot be supported.

2. The attachment law of this State does not require the plaintiff to make oath that the defendant is indebted to him by bill, bond, note, &c., but only that he shall "swear to the amount of the sum due." [Clay's Dig. 54, § 3.] The declaration, of course, will disclose the cause of action, and the defendant may understand from it, what he has to defend against. In every thing essential, it is believed the affidavit conforms to the statute.

3. In respect to the failure to make publication, or otherwise to give notice of the pendency of the suit, it has been repeatedly adjudged, that this was not necessary where a judgment was not rendered against the defendant until more than six months after the attachment issued. [Bickerstaff v. Patterson, 8 Porter's Rep. 245; Murray v. Cone, et al. id. 250; Miller, et al. v. McMillan, et

al. 4 Ala. Rep. 527.] In the present case, the suit was commenced at least eight months previous to the rendition of the judgment.

4. The writing declared on, is, in legal effect, a promissory note. It acknowledges that there is due the plaintiff by the defendants a sum certain, and then sets out the consideration of the indebtedness to be the keeping of stage horses in the defendant's possession. The recital of a consideration cannot change the character of the paper so as to make it less obligatory and conclusive than it would be without it.

5. The return of the sheriff upon the attachment is, that he had levied it on four horses, (describing their colors,) as the property of the defendants. This is clearly sufficient, and would have been unobjectionable, if it had omitted to state that the property levied on belonged to the defendants. [Bickerstaff v. Patterson, 8 Porter's Rep. 245; Kirksey, et al. v. Bates, 1 Ala. Rep. N. S. 303; Miller, et al. v. McMillan, et al., 4 Ala. Rep. 527.]

This view of the case is decisive, and the consequence is, that the judgment of the circuit court is affirmed.

FAIRLEY v. DAVIS, Adm'x.

1. An action of debt *qui tam*, to recover the penalty for issuing a marriage license to a minor, without the consent of his parent or guardian, is abated by the death of the plaintiff, so that it cannot be revived by his personal representative.—*Quere*—Whether it might not have been continued by the State.

Writ of error to the Circuit Court of Wilcox county.

Action of debt *qui tam* by Israel Davis, to recover the penalty given by statute against the defendant as clerk of the county court of Wilcox county, for issuing a marriage license to a minor without the consent of his parent or guardian. After the cause was at issue, the death of the plaintiff was suggested, and Jane

Davis, his administratrix, made a party by whom the suit was prosecuted to judgment. This, among other matters, is assigned as error.

Dear, for the plaintiff in error.

Geo. W. Gayle, *contra*, argued that the commencement of the suit entitled the party to the penalty. [——— v. ———, 6 John. 101; 3 Black. Com. 159; Rowe v. The State, 2 Bay, 565; 1 Viner's Ab. 211; 12 Mod. 267; 1 Bacon's Ab. action *qui tam*, d.]

GOLDTHWAITE, J.—We think this action is within the maxim. that personal actions die with the person, although in form, it is an action *ex contractu*. We have examined the authorities referred to by the counsel for the defendant in error, but find nothing in them to warrant the impression that this action will survive. Indeed, the very absence of all direct authority on this point, is persuasive, that it has never been supposed to be of that class. In the case of Kirkham v. Wheely, [3 Salk. 282,] it is said that when the informer, in such an action as this, dies, there is an end of the suit, and the King is not entitled until recovery had. In 1 Viner's abridgement. 212, it is said, that if the common informer die, the attorney general may proceed for the crown. This would scarcely have been said, unless the suit abated as to the common informer. On looking into the cause of Hammer v. Gryffith, [Cro. El. 583,] we perceive in a case where the informer died, Lord Coke, (then attorney general) inquired of the court if he might not proceed for the queen; and the court held that he might; for the reason that it had been allowed to an informer to proceed for his part, notwithstanding a *nolle prosequi* by the crown; and so likewise, when the queen will pardon, for it is only as to her part.

In the absence of any authority, leading to the conclusion that such suits survive, we are constrained to declare our conviction, that they do not. Whether the State was entitled to proceed in the matter, is not a question for us now to decide.

Judgment reversed.

BLEVINS & HORTON v. THE BANK AT DECATUR.

1. The Decatur Bank, by its agents, entered into an agreement to take a tract of land belonging to B, one of its debtors, "at its fair cash value," to be ascertained by five persons who were selected by the parties—the land to be paid for by the debt due the bank from B; and the residue in the notes of the Bank of the State of Alabama—The persons agreed on, estimated the value of the land at thirteen dollars per acre, payable in Alabama bank notes, which were then at a discount of from twenty-five to thirty per cent.—*Held*, that the true construction of this contract was, that the land was to be taken by the bank at its cash money value in the market, and that the notes of the Bank, and the debt of B. were to be considered as money in payment of the land—that a court of chancery would not enforce a specific performance of the contract, because, by the mode adopted to ascertain the cash value of the land, the debt of B. and the notes of the Bank were not considered as money, but were, in effect, scaled by the supposed difference between them and specie, by the appreciated price put upon the land, over and above its supposed value in money; thus defeating the entire object of the Bank in making the contract.

Error to the Chancery Court of Morgan county.

The bill was filed by the plaintiffs in error, and alleges that the defendant Blevins being indebted to the Bank at Decatur, in the sum of $9,589 46, and being in failing circumstances, so that he could not pay the debt, or any material part thereof, without the aid of his friends, on the 25th Sept. 1842, made a proposition in writing to the Bank, of which the following is a copy:

"Huntsville, Sept. 25, 1842.

"Geo. W. Rice, Esq.

Dear Sir: Mr John Blevins, who is anxious to pay the debt due the Decatur Bank, authorizes me to make to the board of directors the following proposition, viz: The Bank to take his tract of land, containing 2,465 acres, lying in this county, at cash valuation, the same to be ascertained by three or five respectable persons living in the neighborhood, who know the land, such men as Stephen Debose, Wm. Wright, and others, as may be agreed on. Should the land be valued for more than he owes the Bank, the overplus to be paid to him in cash; possession given first of January next. Title to be entirely satisfactory to the

Bank before any payment is made. The board to decide at their first meeting after the receipt of this, whether they will accept the proposition or not. If the Bank accepts the proposition, an agent to be sent up immediately, to attend to valuation, &c.

That the Bank soon after, accepted the proposition, appointing G. W. Rice, its cashier, and L. G. Garrett, one of its directors, its agents, by an order of the board, as follows:

"Branch of the Bank of the State of Alabama at Decatur, 10th Nov. 1842. Ordered that the cashier, in company with Lewis G. Garrett, repair to Huntsville, at the earliest day practicable, with the view of effecting a settlement of the debt due by John Blevins, in any way, so as to secure the amount, or any portion thereof, and for that purpose, they, or either of them, are vested with full power and authority to contract." That after the adoption of said resolution, said president and directors instructed said agents to make the best arrangement they could, and if nothing better could be done, then to take said land upon the terms proposed.

That said agents repaired to Huntsville, when, being unable to make any arrangement other than that proposed, agreed with said Blevins to take the land upon the terms offered, but as the legal title was then in said Horton, it became necessary that he should be a party to the agreement. Thereupon, complainants entered into a written agreement with the agents of the Bank, as follows:

"Memorandum of an agreement, this day entered into by and between John Blevins and Rodah Horton, and the Branch of the Bank of the State of Alabama at Decatur—Witnesseth, that said Blevins is indebted to said Bank by note, in the sum of $9,589 46, due on the 31st January, 1842, besides interest and costs, and in the further sum of $746 86, besides interest and costs, for which last mentioned sum, said Bank has judgment and execution, and said Bank agrees to take from said Blevins in payment for said sums, a certain tract of land, lying in Madison county, supposed to contain about twenty-five hundred acres, (the true number to be ascertained hereafter) at the price to be set thereupon by the persons hereinafter selected and named.—But inasmuch as the legal title to said land is now in said Horton, and in consideration that said Horton shall make to said Bank a good and sufficient title to the same, said Bank agrees to pay to

said Horton in notes of the Banks of the State of Alabama, the whole of the residue of the ascertained value of said land, left after paying said sums of money, with the interest and costs as aforesaid, and in consideration of the payment by the Bank of such residue, left as aforesaid, said Horton on his part, agrees to make to said Bank, good and sufficient deed or deeds, for the whole of said tract of land. Now, to carry out and fully execute this agreement, said parties have mutually chosen and selected the following persons: Thomas Brandon, William Brandon, Benjamin Patterson, William Wright and Levi Hinds, who shall, on Monday, the 21st November inst. or as soon thereafter as may be, go upon said tract of land, and after a full and accurate examination of said land, fix upon the fair cash value, and reduce the same to writing, and give to each of the parties a copy thereof; and in case of disagreement, the opinion of a majority shall be the award of the whole, and binding upon the parties, and each party hereby binds himself faithfully, to execute on his part, this agreement.

JOHN BLEVINS,
L. G. GARRETT,
GEO. W. RICE,
RODAH HORTON.

That a short time after the agreement was made, the persons so selected, did go upon said land and examine it, and four of the five estimated and fixed the value of the land at thirteen dollars per acre, reduced the assessment to writing, and gave to each of the parties a copy thereof. That after the valuation was thus made known to the cashier and Garrett, they as such agents, expressly recognized it as good, fair, and binding, and adopted it as their own act and valuation, and fixed a day certain, when said Horton should go to the Bank to execute the necessary deeds of conveyance, and receive from the Bank said residue.

That by a survey, said tract was found to contain 2,466 37-100 acres, of which the Bank had notice—that on the day appointed by the agents, Horton went to the Bank and offered to execute the agreement on his part, but the Bank refused to perform on its part the agreement of its agents, but by its president and directors, adopted the following resolution, on the 30th Nov. 1842: *Resolved*, that in the opinion of this board, the debt of John Blevins, which was intended to be secured by the purchase of his land, will be wholly lost by the contract made by George

W. Rice, and L. G. Garrett, and the subsequent valuation; therefore, said contract will not be recognized, sanctioned, or fulfilled by this board."

The complainant, Horton, avers his readiness and willingness, and his ability, to make a good title to the land on the payment of the residue, and both prays a specific performance of the contract, and that the Bank be enjoined from collecting the money from Blevins. Appended to the bill, is a plat of the land and survey.

The Bank, by its answer, admits that the proposition was made as stated in the bill, but denies that it was accepted by the Bank, and sets out the resolution stated in the bill, for its action thereupon. It does not admit that any instructions were given to the agents, other than those to be found in their instructions. Admits the agreement was made by their agents, set forth in the bill, but does not admit the agents sanctioned and approved of the valuation made by the referees.

Does not known whether complainants were able to comply, but admits its refusal, because, by performing it, not only would the debt intended to be saved, be lost, but according to the belief of respondent, complainants would receive in money, more than the actual value of the land; that the land was estimated at twice as much as it would command in the market for cash, &c.

Many witnesses were examined to prove the value of the land, which will sufficiently appear from the statement of the facts by the court.

The chancellor considering that the agents exceeded their powers, and that the proof established satisfactorily, that the land had been estimated by the valuers, at a price considerably beyond its true value, dismissed the bill. The complainants prosecute this writ, and assign for error the decree of the chancellor.

Hopkins, McClung, S. Parsons and Robinson, for plaintiffs in error, contended that this was a proper case for a specific performance—that excess of price over value, was no reason for not performing the contract specifically, unless the difference was so great as to shock the understanding, and to furnish evidence of fraud, or imposition. [1 Story's Equity, 249, § 244–5–6; 3 Cow. 445; 5 Porter, 264; 6 Wheaton, 528; 7 Vesey, 202; 1 Cox, 383, 428; 3 V. & B. 187; 9 Vesey, 246; 16 id. 512; 6 id. 272; 7 id. 30; 8 id. 133; 2 Madd. R. 409.] But the proof did not establish any

such inequality, but on the contrary, showed that the price was fair.

The award made by the referees, can only be impeached by proof of fraud or misconduct. [4 Porter, 65; 3 Johns. 367; 10 id. 143; 1 John. C. R. 101; 2 id. 276, 339, 358, 551; 5 Vesey, 846; 1 id. 369; 2 Johns. 62.]

The Bank had power to make such a contract. [Angel & Ames on Cor. 64, 93; Clay's Dig. 112, § 46; id 120, § 8, 122, § 2.]

The directors had the right to delegate their powers, and when properly exercised, was binding on the Bank. [Angel & Ames, 174–5–6, 237–8; 19 Johns. 60, 284; 14 ib. 118; 10 id. 84; 12 id. 231; 7 Cranch, 306; 12 Wheaton, 72; 1 Hals. 115; 3 id. 191; 4 S. & R. 6; 3 Mass. 364; 10 id. 397; 2 Ala. Rep. 452, 718.]

The time of performance of contract, not material, unless some fact set out in the answer, such as change of value, or situation of the parties makes it so. [6 Wheaton, 528; 5 Cranch, 262; 3 Merivale, 81; 7 Vesey, 202, 264, 278; 13 id. 287; 2 S. & L. 682; 7 Paige, 77; 3 Bibb, 367; 6 Vesey, 646; 20 Law Lib. 106–8.]

If the title was considered doubtful, it should have been referred to a master, and upon objections to his report, the court could have investigated the title. [6 Vesey, 646; 7 id. 202; 3 Cowen, 445; 3 Mun. 317; 8 Con. Eng. C. 210; 4 id. 230; 4 Johns. Ch. R. 659; 1 Hopkins, 436; 2 P. Will. 198; 20 Law Lib. 102–3–4, 222; 1 V. & B. 224, 351, 516; 10 Vesey, 315; 11 id. 39; 12 id. 17; 18 id. 482; 1 Wheaton, 179; 1 Merivale, 19, 104; 2 id. 138; 7 Paige 77; 2 Russell, 570.]

Cooper, *contra*—contended that the directors of the bank were trustees for the public, and could not delegate their powers in such a case as the present. [26 Wendell, 485; 3 Louisiana, 568; 4 Mass. 595; 6 Paige, 497.]

That in this case, the agents exceeded their powers, and their act was not binding on the Bank.

Where a matter concerns the public, courts will not decree a specific performance, unless the bargain is beneficial to the trust fund. [2 Hov. on Frauds, 12, 40, 253–4; 1 Mad. C. R. 401; 17 Ves. 290; 18 id. 315; 3 P. Will. 282.]

A specific performance is in the sound discretion of the court, and will not be decreed unless the contract is just, fair and reasonable, which is not the case here. [6 John. C. 111: id. 222; 3

Cow. 445; 4 Porter. 374; 2 Ala. 83; 2 Wheaton, 290; 5 Peters, 264.]

In such a case as the present, time is material, and if the vendor is unable to make title at the time stipulated, he cannot afterwards enforce the contract. [1 Caines, 47; 1 Dallas, 428; 5 Johns. 85; 11 ib. 527; 2 Brockenbrogh, 246; 1 John. C. R. 370; 4 Porter, 385.] The counsel then went into an elaborate examination of the title, tending to show that it was bad, and that the contract was too vague and indefinite in not describing the land to be specifically enforced.

ORMOND, J.—The authority conferred on the agents of the Bank by its order of the 16th November, 1842, did not warrant the agents in making the contract, which they afterwards entered into with Blevins & Horton. It is, however, alleged in the bill, that subsequent instructions were given to the agents by the president and directors, to make a contract conformable to the proposition made to the Bank in writing, on behalf of Blevins, on the 25th Sept. 1842. This is not admitted on the part of the Bank, but there is some proof showing that some further instructions or advice was given by the Bank authorities, and without, therefore, intending to intimate whether these subsequent instructions are to be considered as controlling or vacating the first, or that they were or were not, binding on the Bank, we shall proceed to consider whether this is such a contract as this court can be called on specifically, to enforce, and if it is of that description, then whether the complainants are in a condition to call for the aid of a court of chancery.

In the case of Gould, ex'r of Hayes, v. Womack and wife, [2 Ala. 83,] we had occasion to examine the question of the extent of the authority of this court, in enforcing a specific performance of a contract, and its obligation to act in such cases; that case was one of great importance; the leading cases on the subject, English and American, were examined; and the doctrine, as it is understood at the present day, is thus summed up: "A court of equity will not lend its aid to enforce a specific performance of an executory contract, unless it is just, reasonable in all its parts, and founded on adequate consideration;" by this rule we propose to test the contract here sought to be enforced.

It is quite material to a proper understanding of this case, to

consider the respective attitude of these parties, and the object in view in making the contract now sought to be enforced. Blevins was the debtor of the Bank. in about the sum of $10,000, and although in possession, as nominal owner, of a large tract of land, was in doubtful circumstances. A proposition is made on his behalf, to the Bank, to pay his debt due the Bank, by a sale of his land to the Bank, at "cash valuation." To carry this proposition into effect, certain persons are agreed upon, a majority of whom are to fix upon the "fair cash valuation" of the land, which the Bank is to take at their assessment, and pay the residue after discharging the debt due the Bank, in "notes of the Banks of the State of Alabama."

This proposition, if made in good faith, impliedly asserts that, upon a resale, the Bank will be able to obtain payment of its debts and be refunded, the excess paid upon the purchase. Although it may be admitted that the Bank was willing to submit to some sacrifices to obtain payment of a doubtful debt, such a result would not necessarily have followed, if the terms of the agreement had been fairly complied with. Every one knows the difference in price between a sale for cash and one on credit, although interest is to be paid from the day of sale; and thus, by a resale on credit, the Bank might have reimbursed itself if it could have obtained the land at its fair cash value. That the terms, *fair cash value*, must be considered, in this contract, as equivalent to *fair cash price*, will be evident, when it is considered that the design was to obtain payment of a debt—that the Bank did not want the land for cultivation, and could not use it in that mode; and that it was contemplated by all the parties, certainly by the Bank, to repay itself by a resale; but to produce this result, or to approximate to it, it was essential that the price should not be greatly over-estimated.

The bill does not allege that the land is worth, or will sell for the price put upon it by the valuers, but that "the persons selected, fixed and assessed the value of the land at thirteen dollars per acre;" whilst the Bank, in its answer, alleges, that the land was so grossly overvalued that, by a compliance with the terms of the contract, more than the entire debt intended to be secured, would be lost. Eight persons, who had been examined by the complainants, state the land to have been worth, at the time it was valued, thirteen dollars per acre; whilst of three persons ex-

amined by the Bank, two estimate its value at from fifteen to eighteen thousand dollars, and one, who was one of the original valuers, estimated it at ten dollars per acre, making a difference between the price fixed by the valuers and the two first named, of about fifteen thousand dollars, and of the last, of about eight thousand dollars.

Although, from the nature of the subject, it does not admit of a precise estimate, yet this extraordinary discrepancy between witnesses of equal credit, can only be explained on the supposition, that one or the other side has adopted an erroneous standard or estimate of value—either by some supposed difference between value and price, or by depreciating the medium in which it has to be paid, and which would require an increase of the nominal value of the land, so as to make the medium, in which payment was to be made, approximate to its real value; and upon looking into the depositions, such appears to be the fact.

The proper interrogatory to be put to the witnesses, would have been, *if you are acquainted with the land in dispute, state what was its fair cash value or price in the market at a given time.* The interrogatories which were put, are, after inquiring whether the witnesses were not acquainted with the land, whether it was not fertile and possessed of fine water power, "in view of the goodness of the soil and said water power on it, what would have been the value of said land in November last, to be paid for in Alabama bank notes? Was it not worth, at that time, thirteen dollars per acre, to be paid for in Alabama bank notes? If not, how much?" The manifest tendency of these interrogatories was to lead the mind of the witnesses from the true inquiry, the cash market price of the land; and, accordingly, we find that they answer, that the land was *richly worth thirteen dollars per acre, payable in Alabama bank notes*, which, at that time, were at a discount of from twenty-five to thirty per cent.; but not one of them intimates his belief that it would have commanded that price in the market, or that they were willing, if they had desired to purchase, to give that price for it. The witnesses on the other side, in answer to the interrogatory, what was the fair cash value of the land, say—One of them, that he had desired to purchase it, and never would have given more than fifteen thousand dollars for it, which he thinks its full value. Another says, that about seventeen or eighteen thousand dollars would have been a full

price for the land. The third, who was one of the valuers, says that he valued the land at ten dollars per acre.

These opposite and contradictory opinions can only be reconciled, by supposing that the complainant's witnesses were speaking of the *value* of the land from its fertility and its water power, without reference to its market price, and especially by considering the *medium* in which the land was to be paid for, as affecting its value. The notes of the bank, though, at that time, from the operation of temporary causes, at a heavy discount, were payable in *specie*, which could have been coerced from the bank; and it was, therefore, most unjust to adopt such a rule—not only for the reason just assigned, but also because it was uncertain and fluctuating. The rate of discount, then supposed to exist, might, by the same arbitrary dictation of public opinion, have been reduced to the specie standard on the succeeding day.

A more serious objection than this is, that this mode of valuing the land, violates the agreement of the parties. It could scarcely be supposed, that the Bank would make such a suicidal contract as voluntarily to agree to purchase property to obtain payment of a debt with its own notes at a ruinous depreciation, when, by the very process, the debt intended to be secured would be entirely sunk. Certainly the terms of a contract, from which such a result is to flow, should be very clear and explicit. The contrary appears to us to be the clear meaning and intention of the parties. The Bank was to take the land at its fair cash value, and was to pay for it, in part, by the debt of Blevins, and the residue, in the notes of the Bank. This shows very conclusively, that the debt of Blevins and the notes of the Bank were to be considered, in the purchase of the land, as money. Blevins could hardly have asked that his debt to the Bank should not be considered as cash, or its equivalent; and the notes of the Bank were, in fact, the ordinary circulating medium of the country passing as money, and upon which the Bank could be compelled to pay specie. If it had been the intention of the parties, that the debt of Blevins and the notes of the Bank were not to be considered in the purchase as money, but subject to such an enormous discount, as appears at that time to have been current, it is impossible to suppose it would not have been expressly provided for; and in the absence of any such provision, we are constrained to believe it was not in the contemplation of the parties; the more

especially, as such a stipulation would, in its consequences, in all probability, have extinguished the debt intended to be secured, and, indeed, might have imposed on the Bank an additional loss, without the possibility of being a gainer by it.

If the contract was as the complainants suppose it to be, it might well be questioned, whether a specific performance could be enforced; but the ground of this decision is not that the contract, properly interpreted, might not be enforced in chancery, but it is, that the complainants do not show that they have complied, or offered to comply with it, on their part, by tendering to the Bank the land agreed to be received by it at its *fair cash value.* Nor are we to be understood as deciding that, in ascertaining *the fair cash value of the land,* we would weigh the opinions of those persons agreed upon by the parties to estimate its value in "gold scales." Upon such questions, men may be expected to differ, and nothing but an actual sale could ascertain the fact with certainty. In such a case as this, however, there must be an approximation to the cash price of the land, to entitle the party to the aid of a court of chancery. Some sacrifice the proposition supposes the Bank willing to submit to, and it was reasonable to expect that the land would be estimated at its full cash price.

Here, however, we are not left to grope in the dark as to the relative merit of opposite opinions as to the cash value of the land. The valuers themselves inform us of the rule by which they attained their conclusion, and that, as has been shown, was in violation of the agreement of the parties: and there can be no pretence that the complainants can enforce in equity a contract which, in fact, the Bank never entered into.

These considerations lead us to the conclusion, that the complainants have not made out such a case as to entitle them to relief in equity; and the decree of the chancellor must be, therefore, affirmed.

KING AND CLARKE v. GRIFFIN, USE, &c.

1. The assets which come to the hands of an administrator, pass to his successor if he die, resigns, or is removed before he administers them.
2. The declaration commenced thus: "D. A. G., who sues for the use of S. S., sheriff of T. Co. and successor of said D. A. G., complains, &c.," and then alleges that the defendants made and delivered their promissory note to the plaintiff, by which they "promised to pay, six months after the date thereof, to the plaintiff, by the name of D. A G., sheriff and administrator of the estate of J. C." The breach alleged, is, the non-payment of the note to the plaintiff, without negativing a payment to S: *Held*, 1. That it cannot be assumed as a *legal conclusion*, that G. was administrator in virtue of his office of sheriff, nor that S although his successor in the sheriffalty, was also administrator *de bonis non*, but the description of the latter as sheriff, if necessary, would be treated as a mere *descriptio personæ*. 2. That if S. succeeded G. in the administration, and thereby became the proprietor of the note, the defendant should have pleaded the fact. 3. That the breach was well assigned.

WRIT of error to the County Court of Talladega.

The defendant in error declared against the plaintiffs in debt, thus: "David A. Griffin, who sues for the use of Solomon Spence, sheriff of Talladega county, and successor of said David A. Griffin, by attorney, complains of," &c. and then alleges that the defendants made and delivered to the plaintiff, their promissory note, by which they "promised to pay, six months after the date thereof, (which period is elapsed) to the plaintiff, by the name of David A. Griffin, sheriff, and administrator of the estate of John Calhoun, &c." The breach alleged is, the non-payment of the note to the plaintiff, without negativing a payment to Spence.—To this declaration, the defendants demurred, and their demurrer being overruled, they declined pleading over; thereupon, a judgment by *nil dicit* was rendered in favor of the plaintiff.

L. E. PARSONS, for the plaintiffs in error, insisted that the plaintiff was administrator of Calhoun's estate, in virtue of his office of sheriff, and when he was superseded by the election and qualification of a successor, his right to maintain an action in that character, ceased, and the assets and evidences of debt due his

intestate's estate, passed to the administrator *de bonis non*, who alone could maintain an action for their recovery. The declaration shows that the plaintiff had no title to the note in question, and the demurrer should have been sustained. He cited Clay's Dig. 222, § 10; Minor's Rep. 206; 2 Stew't Rep. 133; Harbin v. Levi at this term. It is no answer to the objection to say, that the defendants cannot be prejudiced by permitting a recovery in the form in which the action is brought, if they really owe the debt. [4 Ala. Rep. 571.] The declaration is also defective in alleging that the note has not been paid to the plaintiff, without negativing a payment to Spence, who was authorized to receive the money.

Bowdon, for the defendant.—Conceding the law to be as stated, in respect to the rights of an administrator and his successor, and it is contended that the suit is well brought under the act of 1837. [Clay's Dig. 376, § 76; White v. Ivey, use, &c. 4 Ala. Rep. 571.] Besides, it does not appear that the note in question is a part of the assets of the intestate's estate, and upon a demurrer, this cannot be intended. The terms sheriff and administrator, may be regarded as merely descriptive of the plaintiff and Spence, and if necessary, to sustain the declaration, may be rejected as suplusage. [1 Chitty's Plead. 253; 8 Mass. Rep. 109; 3 Ala. Rep. 154; 4 id. 642.] He also cited 2 Ala. Rep. 342; 4 id. 26, to show that the note declared on, was not a part of the record, because not made such by bill of exceptions.

COLLIER, C. J.—1. It has been repeatedly decided, that the assets which come to the hands of an administrator, pass to his successor if he dies, resigns, or is removed before he administers them. Under the influence of this principle, the administrator *de bonis non*, becomes entitled to the bonds, notes, &c. which his predecessor had in his hands when his representative functions ceased. [Caller's ex'rx v. Boykin & Bassett, Minor's Rep. 206; King v. Green, et al. 2 Stew't Rep. 133; Harbin v. Levi at this term.]

The question is, does the declaration show that the note, the amount of which is sought to be recovered, was assets of the estate of Calhoun, in the hands of the plaintiff, or that Spence has actually succeeded him in the administration. The plaintiff does

not state that the fact of his being administrator, was the result, and as a consequence of his being sheriff of the county to which the right pertained, of granting letters of administration. In the commencement of the declaration, he does not characterise, either himself or Spence, as administrator, but he complains in his individual right, for the use of Spence, whom he describes as his successor in the office of sheriff. In setting out the cause of action, it is described as a promissory note, payable to the plaintiff, "by the name of David A. Griffin, sheriff and administrator of John C. Calhoun, deceased." Now, although, the plaintiff may have been sheriff, it cannot be assumed as a legal conclusion, that he became the personal representative of the intestate's estate, in virtue of his office. The declaration contains no statement, showing that Spence is administrator *de bonis non*, but this is a mere inference, founded upon the assumption, that the plaintiff's administration was connected with the sheriffalty, and the further deduction, that as Spence has become sheriff, he also is administrator. This latter conclusion is not a necessary sequence, if it were conceded that the plaintiff was administrator *virtute officii*; for the fact that one sheriff has administered, does not make it necessary that the unsettled estate should be committed to his successor, but some other person may succeed to the trust.

For any thing appearing to the contrary, Spence may have acquired an interest in the note, though it may have been assets of Calhoun's estate, under such circumstances as would entitle him to the amount collected. He may have been a creditor, and received it in payment of his debt. In fact, there are cases which determine that an executor or administrator may transfer the assets of the deceased, in satisfaction of his own debts, if there be no collusion on the part of his creditor. [Allender v. Riston, 2 Gill & Johns. Rep. 86; Coburn v. Ansart & Trustee, 3 Mass. Rep. 319.] Be this as it may, no inference can be drawn from his description as sheriff, adverse to the plaintiff's right to sue for his use; the official designation may be regarded as a mere *descriptio personae*. This objection being out of the way, there remains not the slightest pretence for supposing that Spence is administrator, or the action is not well brought.

If the fact be as the plaintiffs in error suppose, that Spence has succeeded to the administration, and in consequence thereof, en-

titled to the note in suit, they should have interposed a plea setting out those facts, and thus have presented the legal question to the court. But they were premature in demurring, and from what has been said, it follows, that the declaration as it respects the point considered, is unobjectionable.

2. In regard to the second objection made upon the demurrer, that the breach in the declaration is not broad enough, we think it is not well taken. It is generally sufficient to lay the breach in terms co-extensive with the legal liability of the defendant. In the present case, whatever may be the rights of Spence in respect to the money to be collected on the bond, the plaintiff alone, for any thing appearing in the declaration, was entitled to sue, and it is enough to allege a non-payment to him. In Lunn v. Payne, [6 Taunt Rep. 140.] it was decided, that in debt on a bond, conditioned for the payment of an annual sum to the wife of the obligee, a breach assigned in the non-payment of the same to the obligee, is sufficient. [See also, 1 Sid. Rep. 178.]

From this view, it results that there is no error in the record, and the judgment is consequently affirmed.

CRENSHAW v. DAVENPORT AND WIFE.

1. When evidence is offered, which is seemingly irrelevant to the matter in issue, it is the duty of the party offering it, to show how it can be made relevant by connecting it with other facts and circumstances already in evidence, or intended to be offered, and if there is no such offer to show its relevancy, the court may lawfully reject it.

WRIT of error to the Circuit of Lowndes county.

Assumpsit on the common counts.

At the trial, on the general issue, and also on one formed on the replication of a promise within six years, it was proved that James Crenshaw, William Crenshaw, and Louisa Davenport, the *feme* plaintiff, formerly Louisa Crenshaw, together with some

three others, were legatees of an estate in lands in Lowndes county; that James Crenshaw was the administrator of that estate; that the lands were sold by commissioners appointed by the orphans' court of Lowndes county; that the sale was made on the 1st of February, 1836. on a credit of twelve months, and the proceeds, being notes on various individuals to the amount of 15,000 dollars, were delivered over to James Crenshaw, the adminisrrator, and by him were divided among the heirs within a few days after the sale.

The plaintiffs, Davenport and Wife, requested the administrator to deliver their portion to William Crenshaw, the defendant; and their portion of the proceeds arising from the sale, was accordingly delivered by the administrator.

The defendant then offered to read to the jury a deed purporting to have been executed by both the plaintiffs. bearing date the 30th April, 1836, expressing the receipt of a consideration of 2,000 dollars, and releasing all the right, title and interest of the said Louisa in and to the lands whereof Stephen Crenshaw died seized, lying in Lowndes county, to James and William Crenshaw. This deed was proved by one of its subscribing witnesses, who stated that it was signed, sealed, delivered and acknowledged, in his presence, by the grantors, as well, also, as in the presence of another subscribing witness; but he saw no consideration pass between the parties.

The plaintiffs opposed the introduction of this deed as evidence, and on their motion, it was rejected. The defendant excepted; and the refusal to admit this deed, is here assigned as error.

Geo. W. Gayle and Edwards, for the plaintiff in error.
Evans and Cook, *contra.*

GOLDTHWAITE, J.—The exclusion or admission of evidence, which is supposed by one party to be relevant, and by the other is considered as irrelevant, is frequently a matter of some difficulty. The general rules on this subject are, however, believed to be sufficiently clear and precise to prevent any injustice from being done. When the relevancy is not apparent from the evidence offered, but other facts will make it so, the duty of the party offering it is to state its connexion with the other facts, in order that its relevancy may be disclosed to the court. [2 Star-

kie's Ev. 381.] It is evident to every one conversant with the practice on the circuits, that a claim or defence frequently depends on a variety of facts and circumstances, either one of which, by itself, would seem to be irrelevant, and yet when the whole are made out, a complete case is presented; but it by no means follows, that a court will, in every case, wade through apparently irrelevant testimony, unles the intention to connect it with other facts, from which its relevancy will appear, is distinctly shown. When, therefore, evidence is offered, apparently not connected with the issue, and is opposed, it becomes the duty of the party offering it, to show its connexion with other facts, either in evidence, or intended to be given to the jury. It is impossible to prescribe the course which counsel shall pursue in putting a case to the jury, but they must always be prepared to explain the object for which the evidence is offered; and if this is not done, the court may lawfully reject that which is apparently irrelevant. This is the clear rule to be deduced from the cases. [Winlock v. Hardy, 5 Litt. 272; Harris v. Paynes, 5 Litt. 105; Wilson's adm'rs v. Bower, 5 Mon. 33; Clark v. Beach, 6 Conn. 142; Rowl, adm'r, v. Kyle, 1 Leigh. 216; Bonham v. Cary, 11 Wend. 83: Weedler v. Farmers' Bank, 11 S. & R. 134; Turner v. Fendall, 1 Cranch, 182; Innerarity v. Byrne, 8 Porter, 176; Jackson v. Webb, 11 Wend. 422; Gratz v. Gratz, 4 Rawle, 411; Cowen & Hill's notes, 434, 792; Mardis' adm'rs v. Shackleford, 4 Ala. Rep. N. S. 443.]

Let us now apply these principles to the facts disclosed by the bill of exceptions in this case. The administrator of the estate in which the plaintiff's wife was entitled to a portion, had delivered the wife's portion of the notes received to the defendant. This delivery, unexplained, would impose a liability on him to account for the proceeds when received in money, but doubtless he could show that the delivery was the consummation of a sale. The deed was probably offered with this view; but as it bears date at a time subsequent to the delivery of the notes, and purports to be a release of the title to real estate, it was, when offered, apparently irrelevant to the point in issue. This being the fact, it was incumbent upon the defendant to show how it could become relevant by a connexion with other facts or circum stances intended to be given in evidence. This was not done, and, therefore, the court properly rejected it.

Judgment affirmed.

WATSON v BYERS.

1. An admission by the defendant, upon the presentation of an account to him that part of the account is correct, but without stating what part, and neither admitting or denying the residue, cannot be construed into an admission that the entire account is just; and is of no value for the part admitted, from its uncertainty.

ERROR to the Circuit Court of St. Clair.

Assumpsit by the defendant against the plaintiff in error. Pleas, non-assumpsit, and the statute of limitations.

Upon the trial, the plaintiff introduced a witness to prove the account upon which the action was founded, who testified that he was present when the account was presented to the defendant, who admitted that a part of the account was correct, but did not state what portion of it, and neither admitted or denied, but was silent as to the residue. Whereupon the court charged the jury, that, from the silence of the defendant, they might presume the entire account to be correct: to which the defendant excepted; and which he now assigns for error.

MARTIN & HUNTINGTON, for plaintiff in error, cited 2 Starkie's Ev. 22; Peake's Ev. 19; Bull. N. P. 236.

CHILTON, with whom was Bowdon, for defendant in error, cited 1 S. R. 398; 1 Rep. Con. C. 296; 2 Yeates, 529; 2 Vernon, 276; 2 Atkins, 252; 3 Johns. C. 575; 7 Cranch, 147; 2 Wash. C. C. Rep. 155, 308; 5 Munford, 25; 1 McCord, 384; Greenleaf Ev. 229; 2 Vesey, sen. 239.

ORMOND, J.—It is a familiar principle, laid down by all the writers on the law of evidence, that the silence of one, against whom a claim or right is asserted, may amount to an admission that the claim is just. This rule is founded on that instinct of our nature, which leads us to resist an unfounded demand. There can, therefore, be no doubt, that if one asserts, in the presence and hearing of another, in such a manner as to entitle him to an

answer, that he is indebted to him in a certain amount, that his silence will, in law, be an admission that the claim asserted is just. So, if, on the presentation of an acconnt, certain items are objected to, it will be an admission of the residue. [2 M. & S. 265.]

Upon the presentation of the account in this case, the defendants admitted that a portion of the account was correct; but by no fair process of reasoning, can this be construed into an admission that the entire account was just. On the contrary, so far as the justice of the account is to depend on the declarations of the defendant, it is a virtual denial of all that part of the account not admitted.

The admission of the defendant, that a part of the account was correct, could not avail the plaintiff, because of its uncertainty; it could furnish no *data* by which to attain any conclusion, and was, therefore, in itself, of no value as evidence, either as to the uncertain portion of the account admitted to be correct, or that part of it about which the defendant was silent.

Let the judgment be reversed, and the cause remanded.

NELSON, A SLAVE, V. THE STATE.

1. An indictment under the second section of the fifteenth chapter of the penal code, for an assault with intent to kill, must, within the terms of the act, allege that the individual assaulted was a "white person;" and an indictment which does not contain such an allegation, cannot be aided by a verdict finding the fact affirmatively.
2. Although the tenth section of the fifteenth chapter of the penal code provides, that at least two-thirds of the jury who try a slave for a capital offence, shall be slaveholders, yet it will be regarded as sufficient on error, if the judgment entry characterize the jury in such case, as "good and lawful men."

THIS cause comes here by a writ of error issued by the clerk of this court in vacation, pursuant to the order of one of its judges. From the record it appears that the plaintiff in error was indicted in the circuit court of Henry, for an assault "in and upon one

Stephen G. Williams," "with intent, then and there, and thereby falsely, wilfully, and of his malice aforethought, the said Stephen G. Williams to kill and murder."

The prisoner was tried on the plea of "not guilty," and the jury by their verdict said, "that they find the defendant guilty of an assault, with intent to commit murder; and also, Stepen G. Williams, the person named in the bill of indictment, to be a white person:" and the court pronounced the sentence of death against the prisoner. On the trial, the prisoner excepted to the instruction of the presiding judge to the jury, informing them that they could, if the proof authorized it, find by their verdict, that the person on whom the assault was alleged to have been committed, was a white person, notwithstanding there was no such allegation in the indictment. It does not appear from the judgment entry, or elsewhere in the record, that any of the jurors who tried the prisoner, were slave holders.

J. Cochran, for the plaintiff in error, insisted, that the indictment was defective, because it did not charge that the person assaulted was a *white person*, and the conviction could not be supported under the 2d section of the 15th chapter, of what is usually called the Penal Code, [Clay's Dig. 472,] nor by the 26th section of the 8th chapter of the same. [Clay's Dig. 442.] He cited the 10th section of the bill of rights; Archb. Crim. Plead. 51; 2 Hale's Pleas of the Cr. 170.

The indictment being bad, it follows, that the instructions to the jury cannot be sustained; for it is clear, that the finding of the jury must be adapted to the case stated, and cannot go beyond it. Again, the conviction is erroneous, because it does not appear from the judgment entry, or elsewhere, that two thirds of the jurors were slave holders. [Clay's Dig. 473, § 10.]

Attorney General, for the State.—The charge of the circuit court could not have prejudiced the prisoner. If the judgment was not warranted by the verdict, the objection should have been made so as to arrest it. [Layman v. Hendrix, 1 Ala. Rep. N. S. 212.] He admitted that The State v. Moses, [Minor's Rep. 393,] supported the objections to the indictment, but the 26th section of the 8th chapter of the Penal Code, virtually overruled that case. That the indictment is good at com-

mon law, was not denied; and the prisoner was obnoxious to the common law punishment. [1 Chit. Cr. Law, 289, 290; State v. Flanigan, June Term, '43; 2d sec. 15 chap. Penal Code, Clay's Dig. 472.] The record does not show that the requisite number of slaveholders were not on the jury who tried the prisoner, or that they were demanded and refused; the objection cannot be sustained.

COLLIER, C. J.—The second section of the fifteenth chapter of the Penal Code, enacts that "every slave who shall be guilty of murder, or commit an assault with an intent to kill any white person," &c. "and be thereof convicted, shall suffer death." [Clay's Dig. 472.] It is insisted, that as the prisoner has been prosecuted for the offence denounced by this section, and has been sentenced to the punishment which it inflicts, the indictment should have charged, that the individual on whom the assault was committed, is a *white person.* In the State v. Flanigan, at June '43, this court say, where a statute is introductive of a new offence, or an offence at common law is made a crime of higher nature; as where a misdemeanor is made a felony; or where a common law offence is made subject to an additional punishment, the indictment in either of these cases, should be drawn in reference to the statute creating, or changing the nature of the offence. But if the statute is only declaratory of what was previously an offence at common law, without adding to or altering the punishment, the indictment need not conclude against the form of the statute. So, where the words of a statute are descriptive of the nature of the offence, there, it is necessary to specify it in the particular words of the act. [The State v. Stedman, 7 Porter's Rep. 495; The State v. Duncan, 9 Porter's Rep. 260, and cases there cited. See also, United States v. Clark, 1 Gal. Rep. 497.]

Of whatever grade of offence an assault with intent to commit murder, may be at common law, it is quite certain that an assault with the intention to kill, without reference to the offence of which the accused would have been guilty, had his purpose been consummated, is a mere misdemeanor. The statute, therefore, which has been cited, in a legal point of view, greatly increases its enormity, and this furnishes a sufficient reason why the indictment should characterize, by a description of his color, the per-

son on whom the assault was committed. But it is insisted, that although the indictment may be insufficient, according to the rules of the common law, yet the twenty-sixth section of the eighth chapter of the Penal Code, cures all defects, and legalizes the conviction. That section is as follows: "All indictments for offences inhibited in this code, which are offences at common law, shall be good if the offence be charged or described according to the common law; and the party charged on conviction, shall receive the punishment prescribed by this act, nor shall the words, "force and arms," or "contrary to the form of the statute," be regarded as necessary in any indictment whatever; but indictments wanting these words, shall be deemed as effectual to all intents and purposes, as indictments having the same words in them."—[Clay's Dig. 442.] This is confessedly a most beneficial enactment, when properly interpreted, and must prevent the guilty from escaping punishment, or procrastinating the period of its infliction by the interposition of objections which merely defeat the administration of justice.

If upon a common law indictment for a misdemeanor, it were competent to impose the punishment which the statute prescribes for a felony, such a principle could not be applied in the case before us. The fact that the individual assaulted is a white person, aggravates the offence, and in point of enormity, makes it equal with murder itself, while such an outrage upon a colored person is regarded as a mere misdemeanor. How can it be assumed then, that the offence punished by the statute, was intended to be charged? Not because the one of lesser grade, though of kindred character, is usually proceeded against, otherwise than by indictment. This would be to assume the offence sought to be punished, was one which the law made capital, though from the indictment itself, it appeared to be subject to, comparatively, but little punishment.

We have seen, that according to the principles of the common law, an indictment founded upon a statute which creates an offence, or adds to its punishment, must bring the case within the terms of the statute; and that no argumentative inferences will supply the want of direct averments. But for the section cited from the eighth chapter of the Penal Code, this rule would be generally applied in this State; and in the present case, as the healing provision of that section, is inapplicable under the cir-

cumstances, the indictment is incurably defective. This seems to us to be the necessary conclusion, from the impracticability of determining otherwise than from argumentative inferences, what punishment is the consequence of a conviction upon such an indictment.

The instruction of the circuit judge to the jury, was clearly erroneous. No principle is better settled in the administration of criminal justice, than that the indictment must be sufficient in itself, and cannot be aided by the verdict, or any thing extrinsic.

2. It is provided by the 10th section of the fifteenth chapter of the Penal Code, that the trial of all slaves for capital offences shall be by the circuit court of the proper county, and at least two thirds of the jury shall be slaveholders. [Clay's Dig. 473.] This provision, it is insisted, makes it necessary to the regularity of the conviction in a case like the present, that the judgment entry should affirmatively show that the jurors were such as it prescribes. The judgment entry characterises the jury, by whom the prisoner was tried as "good and lawful men." Now the laws of this State prescribe the qualification of jurors generally, by requiring them to be householders or freeholders, at least twenty-one years of age, &c., yet it has never been thought necessary that the record should affirm, that the jury who tried a cause, were such persons as the statute required. The conclusion of law is, that the jurors were competent, unless the record shows the reverse to be true. We are unable to perceive why a different principle should be applied in a case like the present. The circuit court, in declaring that the jury are "good and lawful men," must be understood as saying that they were such as the law required to try the case submitted to them, even if it were allowable to raise, on error, the question of qualification, where the point was not reserved on the trial.

For the defectiveness of the indictment, the judgment of the circuit is reversed, and the prisoner is directed to be detained in custody to await further proceedings, or until he be legally discharged.

HARBIN v. LEVI.

1. When an administrator declares, in a contract made with him in his representative character, *oyer* of his letters is not demandable.
2. To a similar action, *ne unques administrator*, is a bad plea, for the representative character is admitted by making the contract.
3. No offset can be made of a personal debt, due from the adminisrator against a contract made with him, which will be assets of the estate.
4. The purchaser of property at an administrator's sale, when he has received the property, cannot, in an action for the purchase money, require the plaintiff to prove the regularity of the sale, and is estopped from showing its illegality, so long as he retains the property purchased.
5. When an administrator has sold property of his intestate, and has not received the price, if he is afterwards removed from the administration, he can maintain no action against the purchaser. The right of action is gone with the administration, and passes to the new administrator.

WRIT of error to the County Court of Lowndes county.

Assumpsit by Levi against Harbin on the common counts. In the commencement of the declaration, the plaintiff describes himself as adminiatrator of the goods and chattels which were of Richardson Blake, deceased. The defendant craved *oyer* of the plaintiff's letters of administration, which was refused; and the court being applied to, refused either to non-suit the plaintiff, or compel him to give *oyer*.

The defendant then pleaded—

1. *Ne unques administrator*, which plea was overruled on demurrer.

2. That the supposed promises were made to the plaintiff as administrator of Richardson Blake; but since that time, and before the commencement of this suit, he had been removed from the administration, and one Samuel Gardner appointed, who then was, and now is, administrator.

This was also overruled on demurrer.

3. Non-assumpsit.
4. Payment.
5. Set-off.
6. Failure of consideration.

At the trial, the plaintiff proved that, in the month of July, 1840, he, as the administrator of R. Blake, offered three negroes, the property of the estate, at auction, at the courthouse door, on a credit of six months, and that the defendant bid them off for 968 dollars.

The defendant offered to introduce evidence of a debt due from the plaintiff to him, for money paid as his security, since the commencement of this suit; which evidence was rejected.

He also offered to read as evidence, the records of the orphans' court, showing that the plaintiff, before the commencement of this suit, had been removed from the administration of Blake's estate; and that one Gardner was then appointed, who now is the administrator on the same. This, also, was excluded.

The defendant then requested the court to instruct the jury, that the plaintiff ought not to recover, unless he proved that an order had been obtained for the sale of the slaves, and that the sale had been made pursuant thereto.

Also, that no title passed to the defendant under the said sale. These instructions were both refused; and the defendant excepted to the several matters ruled against him.

The errors assigned in this court, raise the following questions:

1. Whether the refusal of oyer was proper.
2. Whether the pleas overruled are good.
3. Whether evidence of the set-off was properly excluded.
4. Whether it was competent to the defendant to show, in bar of the action, that the plaintiff had been removed from his administration, and another administrator appointed.
5. Whether any recovery was proper, without showing the regularity of the sale at which defendant purchased.

Bolling, for the plaintiff in error, cited, as to oyer, Clay's Digest, 609, sec. 7; Wyman v. Campbell, 6 Port. 245, as to the necessity to prove the regularity of the sale. Green v. Foley, 2 S. & P. 450; Turner v. Davis, 2 Saund. 139, as to the removal of the administrator.

Cook, *contra*, argued, that the words of description must be regarded as mere surplasage, and profert was unnecessary. [Minor 20; 3 Lomax's Ex. 371; Dane's Ab. tit. assumpsit, ch. 9, § 19; 5 Am. Com. Law, 331.] The removal did not affect his

right to sue, as his successor could not sue on his contract; [Ross v. Sutton, 1 Bailey, 126;] nor could any defence be interposed by Levi of this description, without returning the slaves. [3 Porter, 127.]

GOLDTHWAITE, J.—1. When a contract is made with an administrator, with reference to the personal assets of his intestate, he is not compelled to sue as administrator for its breach, although he may do so if he will. [1 Chitty's Plead. 14; Lowell & Wife v. Watts, 6 East, 405.] As the person contracting with him has dealt with him in his representative character, there is no reason why it should be alleged in the pleadings; and if alleged, it will be considered as mere *descriptio personae*. In Caller v. Dade, [Minor 20,] it was held, where an administrator declared on a bond payable to himself, as administrator, no profert of letters was necessary, because the defendant had admitted his representative character by giving the bond. The same reason applies to every case of a contract made with an administrator as such.

The objection made with respect to the refusal to give *oyer*, when demanded, is not, therefore, available.

2. The same reasoning will apply to the plea of *ne unques administrator*, as that is nothing more than an attempt to revive the same question, which is concluded by contracting with the party as an administrator.

3. The next matter we shall consider is, the set-off attempted to be given in evidence. This was properly rejected, for two reasons: 1st, it occurred after the commencement of the suit; and 2d, because the assets of the estate could not thus be perverted to pay the personal debts of the administrator. In this State, the administrator is compelled, on many, perhaps most cases, to sell the personal property of his intestate on credit; and it cannot be supposed that his personal creditor ought to be permitted to absorb the assets, either in whole or in part, by off-setting his claim, when sued for a demand properly belonging to the unadministered assets.

4. When a purchase is made from an administrator, and the property is delivered under the sale, the necessary implication against the purchaser is, that every matter necessary to make the sale legal and operative, has been performed; and we cannot

suppose a case, where such a defence would be allowed to a purchaser retaining the thing purchased. It is the general, if not the universal rule, that one, in this condition, is estopped from denying his vender's title. [Ogburn v. Ogburn, 3 Porter, 126; Cullum v. Branch Bank at Mobile, 4 Ala. Rep. N. S. 21.]

5. The question remaining to be considered, is that which arises upon the second plea of the defendant, and his offer, at the trial, to prove that Levi had been removed from his administration before the commencement of this suit. We shall consider the question as it arose at the trial. It will be borne in mind, that the evidence of the plaintiff had previously disclosed that the contract was made with him for the purchase of property belonging to his intestate's estate. The rights and duties of an administrator, under the earlier English statutes, are very different from what they are in this State. There, he was clothed with a discretionary power over the personal estate of his intestate, and when disposed of by him, either for money or on credit, the money or notes were absolutely his own. Here, however, the administrator is required by law to dispose of the assets on credit, and it is apprehended that, so long as they continue in a condition to be traced, and are not converted into money, they will pass as assets to any subsequent administrator. This, indeed, is the rule in England, when the property has not been changed. In Turner v. Davies, [2 Saund. 137,] an administrator had recovered a judgment in trover for the conversion of property of his inestate, but his letters were repealed before he had execution. On *audita querula*, by the defendant, it was held, that no execution could go on the judgment, for it was clear that the new administrator could recover it against the same defendant. The principle of that case governed the decision in King v. Green, [2 Stewart, 133,] where a bill single was given to two as the administrators of an estate, who were afterwards removed, and a subsequent administrator was allowed to recover on the bill, without making title through any assignment, but wholly upon the title deduced from his right as administrator It may be that the report of that case is not sufficiently explicit in showing that the bill was given upon a consideration which made it assets in the hands of the subsequent administrator. Green v. Foley, [2 S. & P. 450,] is another case involving the same principle. There, three administrators, in Georgia, had recovered a

judgment against Green, two of whom were afterwards removed or resigned, and the third brought debt, in his own name, upon the record, setting out the facts with respect to the removal of the others. These cases seem to establish, very fully, that an administrator will not be permitted to control the assets of the estate, which he has not reduced to money, after his removal from office; and the two latter go further, and determine, that the subsequent administrator, of right, is entitled to sue, as administrator, for the recovery of such assets. Such would seem to be the necessary result, from the fact, that such contracts with administrators, are assets of the estate; but, in addition, we have a statute which leaves the matter free from all doubt. It provides that any suit, commenced on behalf of, or against any personal representative of any testator or intestate, may be prosecuted by any one who may succeed to the administration; and, further, that when any personal representative, or guardian, shall be displaced, all moneys due to him or her, in that right, by execution or otherwise, shall be paid to his or her successor. [Clay's Digest, 227 § 30.]

We think it is clear that, immediately on the removal of Levi from the administration, his right over any of the assets of the estate ceased, and that it made no difference whether these assets existed in the shape of debts due to the intestate, or due by contract to the administrator. Beyond this, it also seems clear, that the new administrator would be entitled to recover the assets, partially reduced by Levi, in the same manner as Levi himself could have done, if he had not been removed.

The consequence of this reasoning is, that the court erred in refusing to allow the evidence, offered to show Levi's removal from the administration before suit brought. The same conclusion would apply, also, to the plea, but we have not examined its form, and, therefore, give no opinion on it.

Judgment reversed, and, if desired, it will be remanded.

TALIAFERRO v. THE HEIRS OF TALIAFERRO.

1. Where land is purchased by A. with the money of B., a trust results, by operation of law, in favor of B., although the title be taken by A. in his own name. But where a guardian was indebted to his ward, and purchased land which he declared was for the ward, paid for it with his own money, and put the ward in possession, but took the title in his own name—*Held*, that there was no resulting trust to the ward, and that in the absence of proof of an agreement that the land was to be received in payment of the debt, the ward had no title to it.

ERROR to the Chancery Court of Montgomery.

The bill was field by the plaintiff in error, for title to a tract of laud. It alleges that one Thornton Taliaferro was the guardian of complainant, and in that capacity, acted for him, for about nineteen years previous to the fall of 1840, and during all that time, had the charge and control of his estate. That about that time, he purchased for complainant a tract of land, which is described, at $7,000, and put him in possession thereof. That he purchased the land for him on account of his indebtedness to him as guardian, and with the understanding with complainant, that to the extent of the purchase money, it should be a part settlement with him, the guardian being indebted to complainant at the time, in a much larger amount than the purchase money of the land. That he went into possession of the land, with the understanding, and upon the terms proposed, the guardian taking the title in his own name.

The guardian has since departed this life, leaving a widow and two children. The prayer of the bill is, that the title be divested out of the heirs, and vested in him, and for general relief.

The heirs deny all knowledge of the alleged purchase, and require proof, and the widow denies that the facts are as stated in the bill, either as to the purchase of the land for complainant, or the alleged indebtedness of her husband as guardian, and claims dower in the land. She also demurs to the bill.

Joseph A. Green, a witness for complainant, deposed, that Thornton Taliaferro took possession of the personal property of

complainant as guardian, in Feb. 1822. At that time, there were nine negroes, of different ages, from thirty down, and when given up to complainant, in 1839, exceeded twenty in number. He thinks six hundred dollars a year, a low estimate for their yearly value, clear of all expenses. As administrator of complainant's father, he paid the guardian five or six hundred dollars, in Nov. 1827. He heard the guardian say, in the fall of 1840, he had purchased a plantation from Stewart for complainant. He cannot say why he bought it for him, but as the guardian had told him previously, he was indebted to complainant, he took it for granted, it was in part payment.

The rearing, education and support of complainant, was paid by his mother, so long as witness resided in Georgia, where the parties then lived, and he left in 1830. The guardian paid for complainant, from 1832 to 1835, about $300.

J. J. Stewart proved that he contracted with Thornton Taliaferro, for the sale of the land described in the bill in the fall of 1840—that he informed witness that he wished to purchase the land for his brother Zachariah—that he wanted to settle him near him, that he might superintend the place. Before he bought the land, he brought Zachariah with him, and they examined it together. Zachariah had previously spoken to witness about it. He put Zachariah in possession, in the fall of 1840. The land has been paid for.

Leonidas Spyker proved, that the deceased was indebted to complainant, but did not know the amount. Heard complainant say, he was willing to take the land, and release his brother's estate from all further claim.

His honor the chancellor, considering that there was no sufficient proof of the agreement to purchase the land for the complainant, and also, that there was no equity in the bill, dismissed it at complainant's costs. The dismissal of the bill is now assigned as error.

Williams & Saffold, for the complainant.—Although the contract for the land is parol merely, as it has been performed in part, chancery will specifically enforce it. [1 Madd. Ch. 381; Story's Equity, 66–7–8; Sug. on Ven. 105; 9 Paige, 280; 1 Smith's C. P. 491; 1 Swanston, 172.]

ORMOND, J.—The statute of frauds not being pleaded or relied on in the answer, we are to inqure whether the case made by the bill, is sustained by the proof.

The substance of the bill is, that Thornton Taliaferro acted as the guardian of the complainant, for about eighteen years, having had the slaves of complainant in his possession, and having also received several sums of money on account of complainant, from the administrator of his father. That being indebted to complainant in a large sum of money, he purchased for him a tract of land, and put him in possession, but took the title in his own name. That he purchased the land for complainant, on account of his indebtedness to him as his guardian, and with the understanding with complainant, that the land was to be considered to the extent of the purchase money, a part settlement with complainant. That he was indebted to him at the time, in a much larger amount than the price of the land. The price paid for the land was $7,000, of which sum $4,000 was paid dov n, and the residue secured by two notes, executed by Thornton Taliaferro.

If this contract can be enforced, it must be on the ground, either that there is a resulting trust in favor of complainant, or that there was an agreement between the parties, that Thornton Taliaferro should convey the land to complainant in payment, in whole or in part, of the claim of the latter upon him.

When land is purchased by one, with the money of another, a trust results to him, who advances the purchase money, though the title be taken in the name of the person, making the purchase, or in the name of a third person. But in this case, it appears from the bill itself, that the land was purchased with the money and credit of Thornton Taliaferro. The fact that he was indebted to complainant at the time, does not change the nature of the payment. As, therefore, it is clear beyond doubt, that the land was not purchased with the money of complainant, we are next to consider, whether it is proved that the land was purchased by Thornton Taliaferro, upon an agreement with complainant, that the latter should receive it in payment to the amount of the consideration paid for it.

We think the proof adduced by the complainant, shows at least *prima facie*, that Thornton Taliaferro was indebted to the complainant, in a larger sum than the amount paid for the land.

It also appears, that Thornton Taliaferro purchased the land for complainant, but it is not shown by the proof, that he was to purchase it for, or convey it to the complainant in discharge in whole, or in part, of his indebtedness to him. The only witness on this part of the case, Joseph A. Green, says, "I cannot say why he bought it (the land) for him; but as Thornton Taliaferro had told me previously, that he was indebted to him, (complainant) I took it for granted, it was in part payment." It is most obvious, that this conjecture of the witness is no proof that there was an agreement that the land should be received by complainant in part payment of his debt. The proof that Thornton Taliaferro purchased the land for complainant, is entirely consistent with the idea that the latter was to pay for it afterwards. At all events, it has no tendency to prove that he was to receive it in payment of the debt due him. Indeed, the fact that Thornton Taliaferro took the title in his own name, without objection from complainant, is, unexplained, conclusive proof that the parties contemplated something further to be done before the complainant was to be invested with the title to the land. That such was expected to be the result of a settlement between the parties, is very probable. But that it was intended that the land, on its purchase by Thornton Taliaferro, should immediately vest in the complainant, and extinguish *pro tanto*, the debt due from the former to the latter, is not only not shown by the proof, but is inconsistent with the facts stated in the bill.

It results from this examination, that we agree with the chancellor in the conclusion he has attained, and his decree dismissing the bill, is therefore affirmed.

TUGGLE v. BARCLAY, STINNETT & CO.

1. A bill of sale was made by C. (the defendant in execution,) to B., (one of the claimants,) to the negro woman in question, who was at that time concealed, with three other slaves of C. in a county remote from that where the transaction took place, (whither he had removed them,) and was shortly thereafter de-

livered to B. at the place of her concealment. B. then returned in company with C's agent, and another person, to the county in which himself and his vendor resided--the other slaves, under the exclusive control of C's agent, accompanying them. The woman purchased by B. was levied on by *fi. fa.* against C's estate, and claimed by B. S. & Co. On the trial before the jury, the plaintiff in execution asked a witness, what disposition was made of the slaves that were brought back and not levied on, and where they were when he last saw them; but upon the claimant's objecting to the question, the court adjudged the same to be inadmissible, and decided that it should not be answered: ***Held***, that the question was *prima facie* irrelevant, and to have made a direct answer to it evidence, the plaintiff should have stated the object of the inquiry, and how he intended to affect thereby the claimant's title to the slave in question.

WRIT of error to the Circuit Court of Talladega.

On the 24th day of November, 1842, a writ of *fieri facias* was issued from the circuit court of Talladega, at the suit of the plaintiff in error, requiring the sheriff to make of the goods and chattels, &c., of William Miller, Henry Carter and John W. Carter, the sum of seven hundred and forty-seven 60-100 dollars, besides eleven dollars and 56 1-4 cents, for costs. The sheriff of Talladega levied this *fi. fa.* on the 3d January 1843, on a negro woman named Phebe, aged about twenty-two years, and a negro boy named Joe, about two years old—all as the property of John W. Carter. On the 6th February, 1843, Messrs. Barclay, Stinnett & Co. interposed a claim to Phebe, and executed a bond with surety, pursuant to the statute, in order to try the right to her. An issue was made up under the direction of the court, in which the plaintiff affirmed, and the claimants denied, that she was subject to the execution; and this issue was submitted to a jury. On the trial, the plaintiff excepted to the ruling of the court. It appears that on the 2d December, 1842, John W. Carter made a bill of sale for the woman Phebe to Barclay, one of the claimants. This bill of sale was executed in Talladega county, where both the vendor and the vendee resided. About Christmas of that year, Carter employed the witness, who testified to these facts, to go with Barclay into Blount county, where Phebe and three other negroes had been run and secreted by Carter, after the plaintiff in execution had obtained the judgment under which his execution issued. Witness accordingly went with Barclay, and showed him the negroes, secreted among some rocks in the

Warrior hills in Blount, and delivered the woman Phebe to him. Witness, Barclay and one Huey, (the latter of whom has a claim to one of the negroes now pending in the circuit court of Talladega,) returned to Talladega, and the four negroes came with them. These facts being stated, the plaintiff in execution asked witness, what disposition was made of the two negroes, which had been brought back to Talladega, but not levied on by his execution, and where they were when he last saw them. To the answering of this question, the claimants objected—their objection was sustained; and thereupon, the plaintiff excepted.

There was no evidence that claimants had any agency in bringing back the negroes not levied on, or that they exercised any control over them; but they were brought back, as stated above, by the witness as Carter's agent. After the plaintiff excepted to the refusal of the court to permit the witness to answer this question, the witness voluntarily stated that he knew nothing of what had become of the two negroes not levied on; but plaintiff's counsel asked him no further question, and said that under the influence of the decision of the court, he omitted to make other inquiries of him, answers to which would show that he had a knowledge of facts going to establish that he knew what had become of these negroes.

S. F. Rice, for the plaintiff in error. The question proposed to the witness, and which the court decided was improper, should have been answered; and the error of its rejection was not cured by its being afterwards voluntarily answered. [8 Johns. Rep. 447; 12 Johns. Rep. 320; 18 Wend. Rep. 353; Brock, et al. v. Yongue, et al. 4 Ala. Rep. 585.]

W. P. Chilton and Bowdon, for the defendant in error. If the plaintiff had desired an answer from the witness, he should have stated to the court the object of the inquiry, or have shewn, in some manner, that his question was pertinent, and intended to elicit material evidence. [8 Porter's Rep. 176; 1 Ala. Rep. 160; Chandler v. Hudson, at this term.] *Prima facie*, it was irrelevant, and is not aided by any thing that was said by the plaintiff's counsel after it was rejected. But even if the decision of the court was erroneous, the witness answered the question, and the

plaintiff might have examined him further, and cannot now allege the matter of his exception. [Oden v. Ripetoe, 4 Ala. Rep. 68.]

COLLIER, C. J.—The facts disclosed in the bill of exceptions, would warrant the inference, that the object of Carter was to place his property beyond the reach of the plaintiff's execution, by removing it to another county; but there is no proof recited in the record, which implicates the claimants, or either of them, in the consummation of such a purpose. It does not appear that the plaintiff had caused an execution to be issued upon his judgment previous to the removal of the negroes from Talladega to Blount. In fact, the inference is clear, that none had issued. This being the case, the plaintiff acquired no lien upon the slaves, and it was competent, so far as his interests were concerned, for Carter to have sold them to Barclay, or any one else, who, in good faith and for a valuable consideration, might desire to purchase them. The fairness of Barclay's purchase, and the adequacy of the consideration paid by him, seem not to have been controverted in the circuit court, so far as we can judge from the facts recited in the bill of exceptions. What object the plaintiff had in view, in inquiring what disposition had been made of the two negroes that were not sold by Carter either to Barclay or Huey, it is difficult to conjecture. It is quite immaterial, so far as the claimants' right to the negroes, now in controversy, is concerned, what has been done with them, unless the claimants had some agency in placing them beyond the reach of the plaintiff's execution; and even then, we cannot very well conceive how their title to Phebe, if valid, would be defeated.

The question, then, was *prima facie* irrelevant, and, consequently, inadmissible. To have made a direct response to it, evidence, the plaintiff should have stated the object of the inquiry, and how he intended to affect thereby, the claimants' title to the slave in question. What was said afterwards by the plaintiffs' counsel, was not intended to show the pertinency of the rejected evidence, but it was a mere declaration, that if he had been allowed to pursue his own course of examination, he would have shown a state of facts from which it was inferable, that the witness knew where the two negroes were, about which he inquired. Concede that this had been shown by a direct answer, and still, in the posture in which the case is presented, the evidence was

inadmissible, for the reason already stated, that it was entirely without the issue submitted to the jury. If the plaintiff proposed to prove that the claimants, not only had possession of Phebe, but the other two negroes, also, and from the inadequacy of consideration, or other cause, the transaction by which he acquired the former, was fraudulent, he shonld have so stated it to the court. In the absence of such a statement, or some other basis on which to rest the question, its rejection was entirely proper.

We need not consider whether the voluntary answer, made by the witness, would have cured the error. if any; since, as we have seen, the court decided the law correctly. The judgment is, consequently, affirmed.

BONNER v. GREENLEE'S HEIRS.

1. When lands are subjected to sale at the suit of an administrator, under the act of 1822, and a conveyance is made to the purchaser by the administrator, but there is no final decree by which he has been directed to convey the title, the title of the heirs at law, is not divested.
2. *Quere.* If under the act of 1822, the administrator is appointed sole commissioner to conduct the sale, and does so, and afterwards makes a report, setting out the sale and conveyance by him, and the judge of the county court endorsed the report, as approved by him, and orders it to be filed and recorded among the papers of the estate, is this order a final decree, or will it furnish evidence to warrant a decree *nunc pro tunc?*
3. When the plaintiffs claim title to land as the brother and descendants of a brother of the person last seized, it is not necessary to prove that the brothers were begotten in lawful wedlock: it is sufficient to show that they were the lawful brothers and legal heirs of the deceased.
4. When there are other heirs at law not joined in an action of trespass to try title, the objection, if good at all, can only be taken by plea in abatement.
5. An action of trespass to try title, must be brought against the tenant in possession, and it is no defence for him to show that he holds under a will for the benefit of others.

WRIT of error to the Circuit Court of Wilcox county.

Action of trespass to try title and recover possession of certain lands. The parties' plaintiff are David Greenlee, James D. Davidson and Hannah, his wife, John P. Finley and Mary Jane, his wife, James L. Watson and Sarah, his wife, John F. Greenlee, Martha Greenlee, William Greenlee and Francis Greenlee. The cause was tried upon the general issue and other pleas, and a verdict returned for the plaintiffs, affirming that they were entitled to two undivided third parts of the lands specified, and ascertaining also the damages assessed for the detention of the same. On this verdict, judgment was rendered, and Bonner prosecutes the writ of error.

The title of the plaintiffs, as it was shown in evidence, was this, Samuel Greenlee was the patentee of the lands, and died in 1823, without leaving any descendants. He had two brothers and one sister, who survived him, and were his heirs at law. David Greenlee, one of the plaintiffs, is one of the brothers, and the other plaintiffs, except the husbands of such as are described as *covert*, were all children and heirs at law of James Greenlee the other brother of Samuel. James died in the year 1840.

The defendant made title under a deed from William Black, as administrator of Samuel Greenlee, and proved that he was appointed administrator, by the orphans court of Wilcox county, the 22d Dec. 1823. The defendant also shewed, by the records of that court, that Black filed a petition therein for the sale of the lands in dispute here, at the February term, 1825, in which he prayed for their sale, alleging that the personal property of his intestate, was not sufficient to pay the debts due. On this petition, a decree was rendered for the sale, afterwards Black made return of the sale of the lands made by him, upon which the following order was made: "Examined, approved and ordered to be recorded, and to be filed in office among the papers of the said estate." This order is signed by the judge of the county court, and dated 12th February, 1828. No other order was shown, and no final decree was made by the judge of the county court, directing the administrator to convey the lands to the purchaser. Samuel Bonner purchased the lands, and a deed to him from Black, the administrator of Greenlee, was produced and proved.

The defendant then proved, that Samuel Bonner went into possession of the lands, and held the same until his death. He left several children, some of whom are of age, but were not in

possession of the lands. William Bonner, the defendant, is the executor of the last will of Samuel Bonner, and holds possession of, and cultivates the lands under a clause of the will. In this way, he has had possession from 1st January, 1839.

On this state of proof, the defendant moved the court to instruct the jury,

1. That unless the plaintiff proved that the brothers and sisters of Samuel Greenlee were begotten in lawful wedlock, the plaintiffs were not entitled to recover.

In answer to this request, the court instructed the jury, that the proof must show the plaintiffs were the lawful brothers and sisters, and their descendants, and the legal heirs of Samuel Greenlee.

2. That the order of the judge of the county court made upon the return of the sale of the lands, was such a final decree as would divest the title out of the heirs of Samuel Greenlee.

This was refused, and the jury instructed, that to divest such title, there must be a final decree or order, confirming the sale and directing the conveyance of the lands to the purchaser.

In explanation of this charge, it is stated, that the petition showed it was filed under the act of 1822.

3. It was shown in evidence, that there were other heirs at law of Samuel Greenlee, who were not joined in the action, and upon this the court was asked to charge, that the present plaintiffs could not recover. This was refused.

4. That if the defendant held the possession only, as the representative of Samuel Bonner, then that the plaintiff ought not to recover. This was refused.

The defendant excepted, and here assigns the same matters as error.

Bethea, for the plaintiff in error.
Sellers, *contra.*

GOLDTHWAITE, J.—1. The important question in this case is, that which involves the title by which the defendant held the land in controversy.

In Lightfoot v. Lewis' heirs, [1 Ala. Rep. 475,] we held, that when the proceedings to subject lands of a deceased person to sale, at the suit of his executor or administrator, are under the act of 1822, [Clay's Digest, 224, § 16 to 22,] it must appear, not

only that a final decree was made upon the coming in of the report of the commissioners appointed to conduct the sale, but also, that a conveyance in pursuance of the decree, was necessary to divest the heirs at law of the title. In this case it seems, that the administrator actually conveyed the land to a purchaser, but it does not appear that he was authorised to do so by any decree of the county court, and it seems to be conceded that the proceedings to subject the land, were had under the statute before referred to. It is certain, that the memorandum indorsed upon the papers in the county court, cannot be considered a final decree, as it is presented by the bill of exceptions, and consequently there was no error in the ruling of the court.

2. It is possible that the judge of the county court appointed the administrator as a sole commissioner to sell the land, and it may be, that in his report of the sale he sets out, that he has conveyed the land to the purchaser upon payment of the price, or upon taking his bonds for it, if such was the order; although such a course would have been erroneous under the act of 1822, we are not prepared to say that it would be so entirely void as to defeat the sale, if sustained by a final decree approving it. Whether the memorandum indorsed by the judge of the county court upon such a report, approving and ordering it to be filed among the papers of the estate, could be considered as a final decree, or afford sufficient evidence to enter one *nunc pro tunc*, are questions which need not now be discussed.

3. The call of the defendant upon the court, to instruct the jury that the plaintiffs could not recover unless it was proved that the brothers and sisters of Samuel Greenlee were begotten in lawful wedlock, was properly refused, because they might, notwithstanding, be his heirs at law. The common law required nothing more for legitimacy, than that the child should be *born* in wedlock, and our statute legitimates bastard children, when their parents afterwards intermarry, and the father recognizes them.—[Clay's Digest, 165, § 3.] We do not presume, however, that any such objection was urged or existed in this case, but our remarks are necessary to show, that the charge ought to have been declined. The one actually given, placed the matter in its proper light before the jury, and seems entirely unexceptionable.

4. It is supposed by the defendant's counsel, that this action cannot be maintained, because all the heirs at law of Greenlee,

have not joined in the suit. It is said by Chitty, that tenants in common, must in general, sever in such actions, and in ejectment, that a joint demise would be improper; but in personal actions, as for a trespass or nuisance to their land, they may join, because, in these actions, although their estates are several, yet the damages survive to all, and it would be unreasonable, when the damages are thus entire, to bring several actions for a single trespass; a tenant in common may, however, sue separately, as in ejectment for his undivided share, or in trespass for the mesne profits. [1 Chitty's Plead. 56.]

From this it would seem, in an action of this nature, that the action can be either joint or several, but however this may be, it is certain, that if there are parties who ought to have joined, but who have not, the objection could only be taken by plea in abatement, and the defendant cannot in actions *ex delicto*, give evidence of the non-joinder to defeat the action. [1 Chitty's Plead. 56.]

5. The remaining exception to be considered is, that which questions the right to sue the defendant, inasmuch as his possession is only fiduciary, and for the benefit of others. This cannot avail him, because his possession is without title; and this action is necessarily brought against the tenant in possession, irrespective of ownership.

Our conclusion in the whole case is, that there is no error brought to our notice by the several assignments, and the judgment is, therefore, affirmed.

HESTER v. WESSON.

1. A promise by an administratrix, to pay a debt due by her intestate, is not bindinfi on her individually, although it be in writing, there being no new consideration for the promise.

Error to the Circuit Court of Benton.

This was a proceeding before a justice of the peace, for a sum

under twenty dollars, and carried by *certiorari* to the county court.

On the trial, it appeared that the husband of plaintiff in error had agreed to send his children to school with defendant in error; that after the school commenced, the husband died; that the children continued to go to the school afterwards. At the close of the session, on the application of defendant in error, she gave her note for the tuition of the children sent, under and according to the agreement entered into between her husband and the school master.

Upon these facts, the court rendered judgment for the plaintiff, from which this writ is prosecuted.

T. A. Walker and S. F. Rice, for plaintiff in errror, cited 8 Johns. Rep. 120; 17 ib. 304; Chitty on Con. 22, 40, 45; 7 Term, 350, and note.

ORMOND, J.—This action is on a note made by the plaintiff in error, the consideration of which was a debt due by the estate of her intestate. It does not appear that there was any new consideration of harm to the promissee, or benefit to the promissor; and it is, therefore, a promise by the adm'rx to pay the debt of her intestate, which, although in writing, being without consideration, is void by the statute of frauds. This has been considered the settled construction of the statute, ever since the decision in the case of Rann v. Hughes, determined in the House of Lords. [See the case in 7 Term Rep. 350, note.]

The judgment must be reversed, and the cause remanded.

WINSLETT v. McLEMORE'S ADM'RS.

1. The judgment entry recites that the parties came "by their attornies, and the defendant suggests that the plaintiffs have resigned as administrators, of, &c., which fact being proved to the satisfaction of the court, and the defendant withdrawing his plea, says nothing in bar or preclusion of the plaintiff's demand.

It is therefore considered, &c.:" *Held*, that it could not be inferred from the defendant's suggestion that the plaintiffs had resigned the administration; the fact not being admitted by them, it should have been asserted by plea regularly interposed, and tried by the jury, and the court was not competent to determine it upon hearing the evidence.

WRIT of error to the Circuit Court of Coosa.

The defendants in error declared on a promissory note, payable to Elijah McLemore, their intestate; to which the defendant pleaded—1. Non-assumpsit. 2. That the plaintiffs were not administrators, as alleged in their declaration. On these pleas, issues were joined, but not submitted to the jury. A judgment was rendered in these words: "This day came the parties by their attorneys, and the defendant suggests, that the plaintiffs have resigned as administrators of Elijah McLemore; which fact being proven to the satisfaction of the court, and the defendant, withdrawing his pleas, says nothing in bar or preclusion of the plaintiffs' demand—therefore, it is considered by the court, that the plaintiffs recover of the defendant the sum of three hundred and sixty-eight dollars, the damages in the declaration mentioned, together with the costs in this behalf expended," &c.

MORRIS, for the plaintiff in error, insisted, that it appeared, from the judgment entry, that the plaintiffs below had no right of action, and the judgment in their favor was, consequently, erroneous.

No counsel appeared for the defendant.

COLLIER, C. J.—The judgment entry in this case is in an unusual form, and its true meaning somewhat involved; but we think it must be thus interpreted, viz: that the defendant, instead of insisting upon a trial of the issues, withdrew his pleas, and suggested and proved to the court, that the plaintiffs had resigned the administration of the intestate's estate. In such case, the court was not competent to try the suggestion without the plaintiffs' assent, and the record discovers nothing from which their consent is inferable. In Hatch v. Cook, [9 Porter's Rep. 177.] this court say, that when the death of either of the suitors is suggested by the counsel who had previously represented him, the

court will, of necessity, ascertain the fact in some other manner than by plea; but when the suggestion of the plaintiff's death is not admitted by the person representing him, the suit can only be arrested by plea *puis darrein continuance*. This case was one where the plaintiff died, *pendente lite*, and though the facts are not identical with the present, yet the principle determined shows, that the fact, whether the plaintiffs were ever administrators, or, being administrators, resigned their trust previous or subsequent to the commencement of the suit, is triable by a jury upon an issue formed for that purpose.

Conceding to the judgment entry all verity, and still its recitals do not *legally* show that the plaintiffs were not entitled to recover; for the reason, as already stated, that it was not competent for the court, instead of the jury, to entertain and adjudicate the fact of their resignation, unless they assented to that mode of trial.

The consequence is, the judgment of the circuit court is affirmed.

INGE, ET AL. v. FORRESTER.

1. A testator, by will, directs that certain persons shall have full power and control over the property described in the will, "to be used and managed at their discretion, for the mutual use, benefit and interest of his daughter," (she then being a *feme covert*,) "and her surviving children: and as they come of age or marry, the property to be equally divided between her and them." This does not invest the wife with a separate estate; nor is the interest liable to subjection, by a suit in equity, for the payment of a promissory note executed by her together with her husband. Nor can the husband's interest in it be reached in a suit, where the allegations of the bill charge the estate to be one to the separate use of the wife.

WRIT of error to the Court of Chancery for the 22d Chancery District.

The case made by the bill is this. The complainant, as a car-

penter, in January, 1839, made a contract with Mrs. Inge, then and now the wife of Francis Inge, to perform certain work on a house for Samuel Inge, their son. When making the contract, it was distinctly understood, that the husband was insolvent, and the work was to be performed on the credit of the wife, who then, and yet has a large separate estate. After the work was performed, both husband and wife executed their joint and several note, dated 29th April, 1840, for eight hundred fifty dollars, with interest from date, payable to complainant on the 1st of March then next. Other work, to the value of 387 dollars, was also performed by the complainant, on the credit of Mrs. Inge; but this she refused to include in the note. Samuel Inge is alleged to be the trustee in whose name the separate estate is held. Both Francis and Samuel Inge are charged to be insolvent; and the prayer of the bill is, for a discovery of the separate estate of Mrs. Inge, and that payment of the note may be decreed out of it.

All the defendants answer, and concur in denying that a contract was made by Mrs. Inge, with the complainant. for the performance, or for the payment of the work. The execution of the note is admitted, but Mrs. Inge insists, that it was without any consideration as between her and the complainant; that she gave it at the request, and in order to oblige her husband. Francis Inge asserts, that when the note was executed, he informed the complainant that Mrs. Inge had no separate estate, and that her name to the note would be of no value. He also alleges the payment of 359 dollars, and the purchase of land of him, by the complainant, for 400 dollars more, which he asserts should be credited on the note. All the defendants deny that Mrs. Inge is entitled to a separate estate, though they admit that Samuel Inge holds lands, slaves and other property, under the will of her father, in trust for Mrs. Inge and her children.

This will is made an exhibit, and the clause which relates to the property, sought to be charged by this suit, is in these terms:

"It is my wish and desire, that the above named men (Sol. Williams and John A. Williams) should have full power and control over all the following property, to be used and managed at their discretion, for the mutual use, benefit and interest of my daughter, Rebecca Inge, and her surviving children; and as they come of age, or marry, that the following negroes to be equally divided between her and them, to wit: (here follow the names of 34

slaves, all of which, but one, are said in the will to be in her possession;) and at the death of my wife, (here is inserted the names of 17 more slaves.) It is my wish that, at the death of my daughter, Rebecca, all the lands that she now lives on, with the following items, purchased at the sale of Francis Inge, be sold and divided among the children as above." (Here is inserted a description of several articles of household and kitchen furniture.)

The insolvency of Francis Inge is admitted. No evidence was taken by either party; and the chancellor, on the final hearing upon the bill, answers and exhibits, decreed that the complainant recover of Mrs. Inge 997 33-100 dollars, the amount then due upon the note, and also the costs of this suit, to be paid and discharged out of her interest, and share in the profits and income arising out of the trust estate devised and bequeathed to her and her children by the will of Samuel Williams, deceased.

That Richard J. Inge, (he having been substituted as trustee in place of Samuel Inge, at the request of Mrs. Inge, and made a party to the cause by a previous order,) should pay the same out of any profits or income derived from the trust estate, being the share of Mrs. Inge in the same, if any such was in his hands; and if there was none, then to retain her share as the income might accrue; and apply the same to the payment of the amount decreed, until the whole, including interests and costs, should be fully paid.

The trustee was also directed to report, at the next term of the court, what he should do in the premises; and, also, in what the trust property consists, with its yearly income and profits.

This decree is now assigned as error.

Murphy and B. F. Porter, for the plaintiff in error, made the following points:

1. A *feme covert*, in general, cannot bind her person or property. [2 Story's Eq. 625.]

2. The contract here, indicated no intention of binding the separate estate; and that is the only contingency which will authorize a decree against it. [2 Story's Eq. 626, n. 1; 1 Dess. 174.]

3. If the separate estate is bound here, it is so connected with the interests of children, that it cannot be reached by a creditor. [2 Am. Eq. Di. 24, § 7; 1 Har. & Bar. Eq. Dig. 245, § 7.]

4. The estate of a *feme covert* cannot be bound by implication. [Forest v. Robinson, 4 Porter, 44; 1 Dess. 180.]

Peck, *contra*.

GOLDTHWAITE, J.—The view which we take of the trust created by the will of Mrs. Inge's father, renders it unnecessary to determine any other question connected with the case.

The slaves named in the will are committed to the charge of the persons therein named, with full power and control, to be used and managed at their discretion, for the mutual use, benefit and interest of Mrs. Inge and her surviving children, and are to be equally divided between her and them, as they become of age, or marry. At her death, the lands, on which the will states she was, at the time of its execution, then living, with certain household and kitchen furniture, were to be sold and divided between her children, as before stated. Although this is an equitable estate merely, in the *cestuis que trust*, there is nothing in the terms used which warrants us to construe Mrs. Inge's portion as settled upon her for her sole and separate use.

The rule is, that to create an estate for the separate use of a *feme sole*, that intention must clearly appear upon the face of the instrument. [Clancy 262 to 270; Dunn v. The Bank of Mobile, 2 Ala. Rep. N. S. 152; Lamb v. Wragg & Stewart, 8 Porter, 73.] Here, there is an entire absence of any expressions from which such intention can be inferred, and the equitable interest of Mrs. Inge, under the will, is in the same condition, with respect to the marital rights of the husband, as any other equitable estate belonging to a wife. It is true, with reference to all such estates, that whenever the husband goes into equity to obtain possession, either of the estate, or of its rents and profits, the court will compel an equitable settlement upon the wife. [Atherly on Marriage Sett. 350.]

Mrs. Inge, having no separate estate, then, in the property sought to be charged, so far as is made to appear by the answer, it is immaterial what the rights of the husband are; because the bill is not framed for the purpose of subjecting those rights.

The result of this conclusion is, that the bill ought to have been dismissed at the hearing, upon the answer and exhibits.

Decree reversed, and here rendered, dismissing the bill.

BARRON, ADM'R, v. PAGLES, ET AL.

1. A *scire facias* calling on the defendant to show cause why the plaintiff, as administrator, should not have execution on a judgment which had been superseded by a writ of error bond, and affirmed in the Supreme court, must issue out of the court which rendered the judgment so affirmed, and not out of the Supreme court.

ERROR to the County Court of Mobile.

Scire facias from the county court of Mobile, by the plaintiff in error, against the defendant in error, to show cause why he should not have execution on a judgment rendered in Mobile county court, in favor of his intestate, and affirmed on writ of error to the supreme court.

The defendants demurred to the *scire facias*, and the court sustained the demurrer and quashed the proceeding, which is now assigned for error.

DARGAN, for plaintiff in error.

STANLY, *contra*—objected that the *sci. fa.* did not show with sufficient certainty, in which court the judgment of the defendant was obtained. That it did not appear by whom the sheriff was commanded to make known the contents of the *sci. fa.* [5 Bos. & Pul. 104; Chitty's Pl. 242.] It is not shown in which court the record remains, whether in the county or supreme court. Lastly, as the judgment of the county court was merged in the judgment of the supreme court, the *sci. fa.* should have issued from that court, and that it has power to do so. [See 2 Stewart, 463.] He also cited Com. Dig. Pleader, 3 L. 3: 2 Tidd's Prac. 1,007; 2 Sellon's P. 198; Arch. Forms, 432; 9 Mass. 522.]

ORMOND, J —We do not think any of the objections taken to this *scire facias*, can prevail. The objection to the command of the writ is, that it is not addressed *to any sheriff of the State of Alabama.* The language employed is, "to any sheriff of *said*

State. This certainly refers to the State of Alabama, in the margin or venue, and at most, could only be reached by a special demurrer.

The objection mainly relied on, is, that the *scire facias* does not show that the record of the judgment is in the county court, but that it appears to be in the supreme court, out of which the *sci. fa.* should have issued.

By the affirmance of a judgment in this court, superseded by a writ of error bond, the judgment of the inferior court is merged in the judgment of this court, as was held in Wiswall v. Munroe, [4 Ala. 9,] but it does not necessarily follow, that the record remains in this court. The statute, [Clay's Dig. 309, § 14,] requires the clerk of this court to certify the judgment to the clerk of the court, from which the cause came, whose duty it is to issue execution on the affirmed judgment. The effect of this is, and such was doubtless the design of the statute, to remove the record of the judgmeut into the inferior court. It would be a singular anomaly, if the record should remain in one court, and the power to issue execution was given to the ministerial officer of another. The certificate of the clerk of this court becomes the record of the affirmed judgment. These facts being distinctly alleged in the *scire facias*, show that the record is remaining in the court out of which the *scire facias* is sued out. The court, therefore, erred in sustaining the demurrer to the *scire facias*, and its judgment is reversed, and the cause remanded.

KING v. SHACKLEFORD.

1. The bill alleged, that the complainant and defendant were appointed executors of the will of J. M., and were qualified, and received letters testamentary as such; that defendant became the surety of one F. in a promissory note, payable to the executors, given for property of the testator's estate, purchased by F.; that a judgment had been obtained thereon, and execution returned "*nulla bona*;" F. was insolvent, and M's estate had been so reported and declared; that the defendant had removed to a distant county of the State, some ten or twelve years ago, had ceased to take an active part in the execution of the will, and that duty devolved upon the complainant: *Held*, that these facts

did not give a court of equity jurisdiction, and if proved, would not authorise a decree in favor of the complainant against the defendant, as the surety of F.

WRIT of error to the Court of Chancery for the 30th district Northern division.

The case made by the bill is this: In 1826 or 7, Job Mason departed this life, having previously made his will, by which he appointed the complainant, King and the defendant Shackleford, his executors. The will was admitted to probate in the county court of Shelby county, and letters testamentary, granted to both the executors, who gave the bond and took the oaths required by law. A public sale was had by the executors of the personal effects of their testator, at which one Ferrell became the purchaser of a slave, for the sum of $615. Ferrell executed his note with the defendant, as his security, dated February 3, 1828, for that sum, payable to the complainant and defendant, as executors of Job Mason, on the 1st day of January, then next. On this note, a judgment was recovered against Ferrell by suit, in the name of both executors, and execution thereupon was returned *nulla bona.* Ferrell is charged to be insolvent On the 18th April, 1828, Mason's estate was declared insolvent, and yet remains so, to a large amount.

The defendant removed to Lawrence county some ten or twelve years ago, and had ceased for a long time to take any part in the execution of the said will, which it is charged, devolved upon the complainant. The defendant refused to pay, or in any manner to account to his co-executor for the amount for which he was thus bound as security for Ferrell.

The prayer is, that the defendant may be decreed to pay the amount of the note to complainant; or that he may be deemed to account for the same as executor, and pay the same to the creditors of the estate, according to the amount of their respective claims; or for such other relief as may be considered proper.

The bill was dismissed for want of equity, upon motion of the defendant; and this is now assigned as error.

PECK, for the plaintiff in error, insisted, that the bill should have been retained, in order that an account might be taken between the executors, even if payment to the complainant or creditors, ought not to be decreed.

HOPKINS, for the defendant, contended, that the bill did not disclose a case for equitable relief. That the defendant was not liable to his co-executor as such, but to the creditors and legatees of the testator's estate; and that a payment to the complainant would not discharge his liability. [14 Peters' Rep. 166.] The removal of defendant from Shelby to Lawrence county, was not a renunciation of his representative character, and did not confer upon his co-executor, rights to which he was not previously entitled [Id. 8 Cranch's Rep. 9.]

COLLIER, C. J.—The act of 1806, concerning wills and testaments, &c. gives to one joint administrator, an action of account against the other, who has taken all, or the greater part of the intestate's estate, and refuses to pay the debts, or funeral expenses, or refuses to account with him. It provides further, that "any executor being a residuary legatee, may have an action of account against his co-executor or co-executors, and recover his part of the estate in the hands of such co-executor or co-executors." [Clay's Dig. 226, § 29.] This statute is the only one which has the remotest application, and it is perfectly clear that the case stated in the bill, does not come within its letter or spirit.

The sole ground on which courts of equity proceed in the administration of assets, is said to be the execution of a trust, viz: that it is the duty of an executor or administrator who has the property in his hands to apply it in payment of debts and legacies; and dispose of the surplus, according to the will of the testator, or in case of intestacy, according to the statute of distribution. [1 Story's Eq 506, and cases there cited.] But the learned author denies that the fact of the administration being a constructive trust, is the sole ground of jurisdiction. He says, "other auxiliary grounds also exist; such as the necessity of taking accounts, and compelling a discovery; and the consideration that the remedy at law, when it exists, is not plain, adequate and complete. [Ibid. 507–8.] Although it is not explicitly alleged, yet the fair inference from the bill is, that the complainant supposes, that by the removal of the defendant to a remote county, and ceasing to be active in the administration of the estate, he is entitled in his fiduciary character, to all the assets which are unadministered. This assumption, as we shall presently show, is inde-

fensible. It is not intimated that the interference of chancery is necessary, either for the purpose of taking an account, or compelling a discovery. True, the remedy, according to the ordinary course of the common law, is not available; but in adjusting the shares, to which the creditors shall be entitled under the report of insolvency, or if there were no creditors, then in directing the payment of legacies, or in distributing the estate, it would be entirely competent for the orphans' court, to render a decree against the defendant, not only for the money in hand, but also for what he was indebted to it.

In Childress v. Childress, [3 Ala. Rep. 752,] we said, "if an executor purchases a part of his testator's estate, he is after the expiration of the term of credit, chargeable with the amount as cash, in the same manner as if he had collected money or converted property belonging to it. True, it is the duty of an executor to collect the debts due the estate he represents; but there is no process by which he can coerce a collection of himself, and as he is the party who is both to pay and receive the money, the law will regard him as in possession of it, from the time it became due." There, as in this case, there were several executors, and one of them charged himself with the amount of his note, given for town lots purchased at a sale made by them, of their testator's estate. The fact that the defendant in the present case, was the mere surety of the purchaser of property, cannot relieve it from the influence of the case cited. He is regarded by our law as equally and simultaneously liable with the principal debtor, and as one of the makers of a joint and several note, might be jointly or primarily sued, had he not been one of its payees.

In Edmunds, et al. v. Crenshaw, [14 Pet. Rep. 166,] it was decided, that where there are several executors, each has a right to receive the debts, and other assets of the estate; and that a payment of the sums received by him, to his co-executor, will not discharge him from liability to the estate. *Further*, that executors are not liable to each other, but each is liable to the *cestuis que trust*, and devisees, to the full extent of the funds received by him. *Lastly*, the removal of an executor from the State in which the will was proved, and in which letters testamentary were granted, does not discharge him from his liability as executor; much less does it release him from liability for assets received by him, and paid over to his co-executor. Here is an authority ad-

verse to the complainant upon every point which his bill presents. It shows that the authority of each executor is equal; that each and all of them are trustees for the persons interested in the estate they represent; and that neither can absolve himself from liability, by removing from the State and paying over the assets which he has received, to the other. If a voluntary payment would be unauthorised, will the law lend its aid to coerce it? This question, it seems to us, must be answered in the negative.

It is not pretended that the complainant is a creditor of the intestate, beyond what the property in his hands will pay. The case is nothing more than that of one of several executors calling upon his co-executor to pay over to him the assets in his hands, upon the allegation that the latter has ceased to be active in the settlement of the estate; and this, although his authority to act, and liability to the *cestuis que trust* still continues. In this view, it results from what has been said, that the bill cannot be supported, and was consequently properly dismissed. The decree of the court of chancery is affirmed with costs.

MARTIN v. LUNDIE.

1. Where the vendor of land takes notes with security, and gives a bond to make titles when the notes are paid, if he afterwards indorses one of the notes, and the indorsee discharges the surety, he is not entitled to enforce the vendor's lien upon the land.

WRIT of error to the Court of Chancery of Talladega.

The case made by the bill is this.

Lundie, the defendant, in February, 1837, sold several contiguous subdivisions of the same section of land, to one Milton, for the sum of 2500 dollars, and took two promissory notes from him, with one Richey as security: one, for 750 dollars; and the other, for 1750 dollars; both due on the 1st January, 1838. Lundie made no conveyance, but gave Milton a bond, condi-

tioned to make him titles when the notes were paid, and when the patents should be received. Some time after the execution of the notes, Lundie sold the one for the smaller sum to Martin, the complainant, and endorsed it. After the note became due, Milton and Richey both being insolvent, Martin took from Milton a portion of the land in payment of the note held by him, and cancelled it. Martin entered upon the possession of the land, with the full knowledge of Lundie, without any complaint or opposition on his part. The other note being unpaid, Lundie sued the makers at law, and pursued them to insolvency. He then filed a bill in chancery to subject all the lands sold by him to Milton for the payment of the larger note. Pending the suit in chancery, Martin filed a petition setting out his claim, and praying that he might be allowed to make himself a party and defend the suit. This was refused; and, subsequently, a decree was rendered subjecting all the land to the payment of that note. Under this decree, the whole was sold. Lundie became the purchaser, who is endeavoring to obtain possession by a suit against the tenant of Martin. The bill asserts, that by the assignment of the note, Lundie's lien upon the land was transferred to the complainant, and that it is not divested by the circumstances; that the land purchased by Martin of Milton, is only a just proportion to the whole debt. It, therefore, prays that the complainant's title may be quieted, and Lundie compelled to release his title under the decree, and for general relief.

The answer of the defendant was filed, which contains also a general demurrer to the bill for the want of equity. The answer is not considered in the decree; and, therefore, need not be stated here, except for the purpose of correcting a mistake in the briefs. It shows that the 750 dollar note was secured by one Brown, (and not Richey, as alleged by the bill,) who is asserted to have been perfectly solvent at the maturity of the note.

The chancellor dismissed the bill as having no equity. This is now assigned as error.

L. E. Parsons, for the plaintiff in error, made the following points:

1. Lundie retained a lien, for the purchase money, on the land sold. [Foster v. Athenaeum, 3 Ala. Rep. N. S. 302; Haley v. Bennet, 5 Porter, 452; Mackrath v. Symmons, 15 Vesey, 29;

Brown v. Gilmore, 4 Wheat. 256; Bailey v. Greenleaf, 7 Wheat. 46.]

2. This lien has the same character, to all intents, as a mortgage. [Haley v. Bennet, 5 Porter, 452.]

3. By Lundie's transfer of this lien, by the assignment of the note, Martin acquired the preference to be first paid. [Cullum v. Erwin, 4 Ala. Rep. 452; 9 Cowen, 316; Kinney v. Collins, 4 Litt. 289; 4 ib. 317.]

4. The debt being the principal, and the mortgage only the incident, the creditor has a right to pursue all his remedies until a satisfaction. [Duval's heirs v. McLoskey, 1 Ala. Rep. N. S. 708; Story's Equity, 1016.]

5. The courts look at the intention of the parties; and if nothing is expressed, the lien is transferred with the debt. Hall's adm'r v. Click, [June Term, 1843.] proceeds upon the principle that the intention there, was not to transfer the lien.

6. As the assignment of the debt transferred the lien, the assignee had a right to purchase the equity of redemption. [2 Cowen, 286.]

7. Under the general prayer, relief may be granted, such as the plaintiff is entitled to.

Bowdon, *contra*, submitted the following points:

1. By Martin's failure to sue the makers at the first term, he lost his recourse upon Lundie, for whose protection *alone* the lien exists. When *his* liability ceases, the lien is gone. [White v. Williams, 1 Paige, 502; Hall's adm'r v. Click, June Term, '43; 7 Gill. & J. 120.]

2. When the note was taken up by the makers, it was *functus officio*, and no lien could afterwards be asserted by it. [3 Ala. Rep. 302, 352.]

3. Lundie retained the legal title, and is entitled to enforce it, as the purchase money is unpaid. [5 S. & P. 216; 3 Ala. Rep. 302.]

GOLDTHWAITE, J.—It is not necessary to put our affirmance of this decree, either upon the ground that the vendor's lien was not transferred by the assignment of the note; or upon the ground, that the lien was lost in consequence of the omission, by the assignee, to take the proper steps to fix the liability of the

assgnor; though the latter reason was held sufficient in the case of White v. Williams, [1 Paige, 502.] It is upon the notion of an implied agreement, that the assignee of a bond or note, given for the purchase of land, is permitted, in equity, to enforce the vendor's lien; and the case of Hall's adm'r v. Click, [June Term, 1843,] is illustrative of the rule. There, it was held, that no such implication arose when the note was transferred without recourse. Here, it will be seen, that in addition to the lien upon the land, the vendor also had the security of another individual. If it was conceded, that an agreement might be implied to permit the assignee, in this case, to enforce the vendor's lien, either for the entire, or *pro rata*, payment of the note, the agreement must be understood with the reservation, that the rights of the vendor should not be impaired by any action of the assignee. It is undeniable, that all remedy against the surety upon this note, has been lost by taking the land in payment, as well as by the cancellation of the note. If the assignee could now be permitted to enforce the note against the land, the consequence, to the vendor, would be, that he has lost, without any negligence on his part, one of the securities which he had in the first instance. It is impossible to infer any such agreement out of the mere fact of assignment; and, therefore, we concur in the opinion of the chancellor, that the bill is without equity.

It is not improper to remark, that, as Martin was a sub-purchaser from Milton, it is possible he is not concluded by the decree of foreclosure, under which the land was sold; and it may be, that as a part of the purchase money has been paid to the vendor, that he has a right to redeem, although there was a default as to the residue.

Decree affirmed.

COOPER v. MADDAN.

1. Where sixteen judgments, between the same parties were rendered by a justice of the peace, and removed by *certiorari* to the county court, it was competent for the court to direct that but one bond should be executed, as the condition on which the *certiorari* and *supersedeas* should issue.
2. Where several suits are depending between the same parties, on appeal or by *certiorari* from the judgment of a justice of the peace, the court may, at the instance of either party, direct a consolidation, unless the party objecting can show that he will in some way be prejudiced thereby.
3. The admission of a party against whom secondary evidence of the contents of a written instrument is offered to be given, that the instrument is lost, will be sufficient to let in the inferior proof.

ERROR to the County Court of Russell.

This was a proceeding commenced before a justice of the peace on s xteen notes by the plaintiff, against the defendant in error, and judgment being obtained by him in all the cases, the latter removed the causes by *certiorari*, to the county court of Russell.

In the county court, the plaintiff moved to dismiss the *certiorari* on the ground that the bond was insufficient, which the court refused—and on the defendant's motion, the cases were consolidated, the plaintiff objecting thereto. The plaintiff then introduced the justice of the peace, and proved by him, that the notes which had been sued on, could not be found by him, after diligent search, and that he had inquired of his two predecessors, the first of whom had rendered the judgment on the notes, and neither of them were able to find them, but the court held this insufficient to authorise the introduction of secondary evidence to prove their contents. The plaintiff then offered to prove that the defendant had admitted that the notes were lost, as a ground for the admission of the secondary proof, but the court rejected it, considering it insufficient. The plaintiff then offered to prove that the defendant had admitted that he was indebted to the plaintiff in the sum of five hundred and fifteen dollars, which evidence the court rejected.

To all v hich the plaintiff excepted, and now assigns for error,

1. The court erred in refusing to dismiss for want of a sufficient bond, or in not requiring new bonds.

2. In consolidating the cases against the consent of the plaintiff.

3. In refusing to admit secondary evidence of the contents of the notes.

4. In refusing to admit proof of defendant's indebtedness.

HEYDENFELDT, for plaintiff in error—cited 1 Ala. Rep. 77; 2 ib. 58.

ORMOND, J.—We are unable to perceive any objection to the course pursued by the judge of the county court, in requiring but one bond to be given, as the condition on which the *certiorari* and *supersedeas* were to issue. It could subserve no valuable purpose to require sixteen bonds to be executed, when the same defence existed to all the judgments, and the rights of the plaintiffs could be fully secured by one. The *certiorari* should not, therefore, have been dismissed for this cause, and if the bond was defective, the defect should have been pointed out, that it might have been remedied by the execution of a new bond.

In Powell v. Gray, [2 Ala. 77,] we held that a writ of error would not lie upon the refusal of the court to consolidate several cases depending between the same parties, but the question is different where the court has directed a consolidation. In such a case, if injury has resulted to the party objecting to it, it could doubtless be redressed on error. But it is difficult to conceive that any injurious consequences could flow from such an order in this case, nor indeed, how it could be otherwise than beneficial to both parties. It was the duty of the party objecting to the consolidation, to show that it would in some way prejudice him, and in the absence of any such suggestion, we must presume that no such obstacle exists to the exercise of the power.

Where secondary evidence is proposed to be offered of the contents of a written instrument, it must first be shown that it is not in the power of the party to produce it, as that it is lost or mislaid, or in the possession of the opposite party. The evidence of the justice of the peace, that after diligent search, he could not find the notes, was not sufficient, because it does not appear they were ever in his custody, and the narration of what his predecessors in office told him, was mere hearsay, and therefore, incompe-

tent testimony. But proof that the defendant admitted that the notes were lost, was competent evidence of the fact, and should have been received. For this error, the judgment must be reversed, and the cause remanded.

MARDIS' ADM'RS v. SHACKLEFORD.

1. The declaration stated that certain notes, accounts, &c. were placed in the hands of M. an attorney at law, who undertook to collect them and pay the proceeds *to the creditors of B. S. & Co.*, and the breach alleged was a failure to collect and pay over the money: *Held*, that the declaration was not bad, for the omission to particularize by name, the creditors to whom the money collected, was to be paid.
2. It is allowable in pleading to refer, in a subsequent to a preceding count: and in an action against an attorney at law, for failing to collect and pay over the amount of certain notes, &c. intrusted to him for collection, if the notes, &c. are sufficiently identified in one count, the counts that follow, may refer to and adopt the description there made, without mentioning their respective amounts, and by whom due.
3. Where claims are placed in the hands of a third person, to collect and pay over to the creditors of the proprietor, an action for the failure to collect them, and pay over the amount, may be maintained by the latter—the creditors being no parties to the arrangement, or their demands being paid by him.

WRIT of error to the Circuit Court of Talladega.

This was an action of assumpsit by the defendant in error, against the plaintiffs. The declaration contains eight counts, on the first six of which, issues of fact were joined, and to the seventh and eighth, the defendants demurred *seriatim*. The seventh count alleges that the defendant's intestate was an attorney at law, practicing in the several inferior and superior courts of this State, and at his request the plaintiff placed in his hands obligations and evidences of debt due from divers persons resident in the same, amounting in the aggregate to the sum of fourteen thousand three hundred and fifty-three dollars and fifty-four and one-fourth cents—all of which are particularly described by a statement of

the names of the debtors, the amount, and when due. In consideration of the premises, and a reasonable fee to be paid to the intestate for his services, he undertook to collect the obligations and evidences of debt, and pay the amount thereon received, to Henry Hitchcock, in the discharge of certain demands in his hands against the late firm of Burke, Shackleford & Co., of which the plaintiff was a partner. The breach alleged is, that the intestate did not proceed to recover the money due and owing to the plaintiff on the obligations, &c. and pay over the amount in discharge of the claims existing against Burke, Shackleford & Co. as it was his duty to do; but wholly failed to collect and pay over the same, &c.; and by such neglect, the plaintiff has been prevented from collecting the obligations, &c. and has been altogether deprived of, and wholly lost the same. The declaration then concludes with a deduction of the intestate's liability, and a promise by him to pay, &c.

The eighth count, instead of describing the evidences of debt placed in the intestate's hands, merely declares that they are identical with those mentioned in the third and seventh counts, and alleges that the money to be collected thereupon, was to be paid to divers creditors of Burke, Shackleford & Co., without designating them in any manner, or stating where their demands were to be found. It avers a breach of the intestate's contract *in toto*, and as a consequence of his default, that the money due the plaintiff on the evidences of debt, were wholly lost to him; and that he has been compelled to pay the demands against B. S. & Co. which the intestate, by his collections, was to have discharged. This count concludes as that which preceded it. The demurrer to each count was sustained, and the cause submitted to a jury upon issues of fact to the entire declaration, who returned a verdict for the plaintiff, for the sum of three thousand and forty-six dollars and seventy-five cents; and judgment was thereupon rendered.

S. Parsons, W. P. Chilton, and Bowdon, for the plaintiff in error. The declaration should have alleged, who were the creditors of Burke, Shackleford & Co., whose demands the intestate was to pay with the proceeds of the notes, &c. placed in his hands for collection. This much was necessary, in order to make it certain to a common intent. [4 Ala. Rep. 70; 9 Johns.

Rep. 271; 1 Chit. Plead. 7 Am. ed. 267; Id. 318, 321, 324; 3 Salk. Rep. 246.] Each count must be complete in itself, and cannot be aided by reference to something extrinsic; the eighth count is, therefore, bad, because it does not describe the evidences of debt which intestate was to collect. [3 Ala. Rep. 103, 244.]

The seventh count shows that the plaintiff has no right of action; if the intestate failed to perform his part of the contract, as the money was to be paid to the creditors of Burke, Shackleford & Co. they must sue. [8 Porter's Rep. 333; 5 Wend. Rep. 235; 9 Cow. Rep. 115; 3 Johns. Rep. 71.] The objections to the declaration are available on general demurrer. [10 East's Rep. 359.]

S. F. Rice, for the defendant in error. The intestate must be supposed to have been cognizant of the residence of the creditors of Burke, Shackleford & Co., and of the amounts due them respectively; consequently, the declaration need not have made a special allegation on this point. [4 Ala. Rep. 70; 6 Com. Dig. 59, (c. 26,) 92; (c. 81.)] The breach and promise are well stated, and admitted by the demurrer. [9 Porter, 552; 3 Ala. Rep. 206; 9 Cow. Rep. 308; 1 Chitty's Plead. 325, and cases there cited; Cro. Eliz. Rep. 749; Step. on Plead. 359, 360; Greenleaf's Ev. 105; n. 1.] It is competent for one count to refer to another for some fact to sustain it, and this although it would be incomplete without such reference. [3 H. & Johns. Rep. 28; 4 Am. Com. Law Cases, 167, 179.] If the defendants or their intestate had used the proper means to ascertain the residence of the creditors, and could not perform the intestate's contract for want of such knowledge, they should, if it could have availed them, have insisted on the matter by way of defence. It was not incumbent on the plaintiff, either to allege or prove any thing in respect to their knowledge.

COLLIER, C. J.—1. It is not essential to the sufficiency of the declaration, that it should state the names, residence, &c. of the creditors of Burke, Shackleford & Co., to whom the intestate undertook to pay the money realized upon the claims placed in his hands for collection. There is nothing in the statement of the cause of action, to show that the creditors were designated, or that the undertaking was not, generally, to pay the money as collected, to those to whom Messrs B. S. & Co. were indebted. If

the intestate had desired the information necessary to enable him to appropriate the money, he should have applied to the plaintiff; and if he could not thus have obtained it, perhaps it might have availed him as a defence, to prove that he was in no default; but was ready and had actually offered to perform his engagement. Be this as it may, the breach alleged, is not that the intestate did not *pay over*, but that he failed to collect and pay over the claims intrusted to him. If there was an entire neglect of professional duty, so that no money was realized by the intestate, he had nothing to pay the creditors, and his representatives cannot insist upon an omission to state their names, residence, &c., as a fatal defect in the pleadings. The accountability of the defendants under such a state of facts, as will be hereafter shown, would be to the plaintiff, with whom the intestate had contracted.

2. It is objected to the eighth count, that it does not describe the claims which the intestate received for collection, but merely refers to the third and seventh counts, and adopts the description contained in the third and seventh counts. The several counts of a declaration are regarded as its different parts or sections, [Step. on Plead, 267] and in framing it, unnecessary repetition should be avoided. This may be done by the counts referring to each other; but unless such reference is made, one count will not be aided by another; "for though both counts are in the same declaration, yet they are as distinct as if they were in separate declarations; and consequently, they must independently contain all necessary allegations, or the latter count must expressly refer to the former." [1 Saund. on Plead. and Ev. 417.] In Ryder v. Robins, [13 Mass. Rep. 284.] the first count concluded that the defendant, "though often requested has never paid, &c. but neglects and refuses, &c.," but the second contained no such averment or any thing equivalent: *Held*, that the allegation of the first, might be applied to the second count. And in Dent's adm'r v. Scott, [3 Har. & J. Rep. 28.] it was considered to be sufficient for one count to set out a consideration, and for the other counts seeking to enforce a contract founded upon the same consideration to refer to it. Each count it was said, need not contain a complete declaration in itself, but by a reference to another, its defects would be supplied. The case of Maupay v. Holley, [3 Ala. Rep. 103,] is entirely consistent with the authorities cited. That was an action of *assumpsit*, and the

declaration contained two counts, in each of which the contract was stated differently. The court said, "where a declaration contains several counts, each count is considered as the statement of a different cause of action; and where issue is taken upon all, the plaintiff is entitled to recover, upon proving the allegations of either." The citations made, are directly in point, and in recognizing them as authoritative, we necessarily attain the conclusion that the objection to the eighth count is not well taken.

3. In respect to the right of the plaintiff to maintain an action for the breach of the intestate's contract, this we think cannot be doubted. The undertaking was, to collect the obligations and evidences of debt, and pay the amount thereon collected, to the creditors of Messrs B. S. & Co. Under this agreement, no legal right to the claims vested in the creditors, and it was only after the money had been collected, (if at all) that they could maintain an action against the intestate for the failure to pay it over.—Hitchcock, et al. v. Lukens & Son, [8 Porter's Rep. 333] which was cited for the plaintiffs in error, is unlike the present. There, the plaintiffs were judgment creditors of a third person, who in consideration that the former and other creditors would extend the time of payment of their demands to a day designated, conveyed by deed, to the defendant, in trust, to secure the debts due to the plaintiffs and other creditors, certain property. The trustees sold a part of the property, and received about eighteen hundred dollars; to recover the amount due them, the plaintiffs brought an action of *assumpsit*, and declared, *first*, on the special contract; *second*, for money had and received. It was shown that the plaintiffs had suspended proceedings on their judgment, and that their execution was entitled to precedence over all others, except one for two hundred dollars. The court held, that where one man has money which *ex aequo et bono* belongs to another, if there be no contract modifying the general liability to pay, the person entitled to the money may recover it in an action for *money had and received;* and this, although he knows nothing of the party who has the right—the law itself creates the privity and the promise. In that case, the plaintiffs were entitled to the money as soon as it was collected, and being a party to the deed of trust, could have sued the trustee for neglecting to perform his duties as such. But in the present case, the undertaking to collect the notes, does not seem to have enured to the creditors;

they were not parties to the contract between the plaintiff and the intestate; and at most, could only claim the money when collected of the intestate or his representatives after his death.

If a right of action for the failure to collect, ever vested in the creditors of B. S. & Co., so far as the eighth count is concerned, the allegation that their demands had been satisfied by the plaintiff, would revest him with the title to the claims in the intestate's hands, and entitle him to sue, in the form in which he has in the present case.

Without extending this opinion to greater length, we would merely remark that we consider the seventh and eighth counts, as entirely unexceptionable. The judgment is consequently affirmed.

GOODWIN, USE OF HALE, ADM'R OF WOODS, v. HARRISON.

1. Under the statute authorising discoveries in suits at law, it is with the party exhibiting the interrogatories to elect whether he will have the adverse party attached and compelled to answer, or continue the cause, or when the defendant is required to answer, to have him defaulted for a failure to answer within sixty days after service.
2. It is discretionary with the court to set aside a default entered upon a failure to answer in such a case, but this discretion ought not to be exercised, unless a satisfactory reason is shown for the failure to answer, and the showing in all cases where practicable, should be accompanied by full and explicit answers.
3. A demurrer to a plea of the statute of limitations, pleaded by name only, with the consent of the parties, raises no question but the one whether the statute can be pleaded to the action.
4. A party, to whom a chose in action is due by parol only, cannot be a witness against the defendant, although the suit is for the use of another, and all his interest in it is extinguished
5. One species of open accounts is, when there are running or current dealings between the parties which are kept unclosed with the expectation of fresher transactions.

WRIT of error to the County Court of Dallas county.

Assumpsit by Goodwin, as surviving partner of Wood, deceased, on the common counts, one of which is for money lent. The defendant pleaded, in short, by consent—1. Non-assumpsit. 2. Payment. 3. Statute of limitations. This last plea was demurred to, but the demurrer was overruled.

Interrogatories, in the nature of a bill of discovery, under the statute, were filed, and the defendant having failed to answer them within 60 days from their service on him, the court, on motion of the plaintiff, set aside the defendant's pleas, and ordered a judgment by default to be entered; but afterwards, in the same term, on motion of the defendant, set aside the default on payment of costs of the term, and reinstated his pleas.

At the trial, the plaintiff offered A. M. Goodwin, the nominal plaintiff, as a witness. The defendant opposing his introduction, the plaintiff offered to prove, by other competent witnesses, that the mercantile firm of Woods & Goodwin was dissolved in March, 1837; and, also, that M. G. Woods, one of the partners therein, and since deceased, took all the assets of the co-partnership, and agreed to pay all the debts. He further offered to prove, that Woods, long since, and before the commencement of this suit, had paid all the debts of that firm, which were known or believed to exist; and that the choses in action, standing in the name of the firm, formed a part of the personal estate of Woods, and had passed to his personal representatives; also, that from the dissolution of the partnership until, and at the trial, Goodwin had no interest in the cause of action, nor was he in any way liable for debts of the said firm; nor interested in the event of this suit, except a liability for costs. The real plaintiff, Hale, also deposited in court a sum of money sufficient to pay all costs, which had accrued, or could arise. The witness was, notwithstanding, rejected.

There was evidence before the jury to show, that two pieces of goods, part of those contained in the general account sued for, were sold at an agreed price; that nothing was said at the time as to the period when payment should be made, but it was the custom of merchants, and the rule of the firm, known to its customers, that articles, thus purchased, were to be paid for on the 1st January thereafter.

On this evidence, the court was requested to charge the jury, if this proof satisfied them that at the time of sale, a price was

agreed on, and the time of payment fixed, with respect to the goods spoken of, then, so far as these articles were concerned, the statute of limitations of three years did not apply. This was refused; and the jury instructed, that in this case, under the pleadings, the statute of limitations of three years would apply, if the articles were sold to the defendant by a merchant in the ordinary course of his business, whether the price was agreed upon or not, provided there was not an agreement more specific with respect to the time of payment, than the general understanding that the price should be due on the 1st January next after, according to the custon of merchants.

The action of the court on these several points, was excepted to by the plaintiff, and he assigns as error—

1. The reinstating the defendant's pleas after the default was allowed for his omission to answer interrogatories.

2. The overruling of the demurrer to the plea of the statute of limitations.

3. The refusal of the court to allow the nominal plaintiff as a witness.

4. In refusing the charge requested.

Evans, for the plaintiff in error, as to the 1st and 2d assignments, cited Clay's Digest, 341, § 160; 1 Ala. Rep. N. S, 124.

As to the 3d, 3 Binney, 306; 6 ib. 478; 2 Dallas, 172; 4 Dallas, 137; 2 Bay, 93; 1 Peters' C. C. 301; 2 Stephens' Nisi Prius, 1737; 1 S. &. P. 17; 1 Ala. Rep. N. S. 506; 1 Ala Rep. N. S. 371.

Edwards, *contra*, cited 2 Ala. Rep. N. S. 100; 1 ib. 62.

GOLDTHWAITE, J.—1. The plaintiff's first exception questions the power of the county court to set aside the default entered in this case, in consequence of the failure of the defendant to answer interrogatories filed under the statute. The act provides, that when the party fails to answer for sixty days after service, or answers evasively, the court may attach the party, and compel him to answer in open court; or may continue the cause; and require more direct and explicit answers; or, if the party be the defendant, it may set aside his plea or pleas, and give judgment against him, as by default. [Clay's Digest, 341,

§ 160] And we think it must be construed as giving the adverse party the election to select either of the modes pointed out, as otherwise the object of the enactment might oftentimes be successfully evaded.

2. But, while the party has his election, which of these modes shall be adopted by the court, at his instance, we think it entirely competent for the court, on the application of the party against whom the interrogatories are filed, on a sufficient showing, to extend the time for the answer, or even to set aside the default occasioned by the neglect to answer within the time specified by the statute. It is obvious that cases may exist where the service is made on an attorney, that his client may not be advised within that time, or he may reside at so great a distance that information cannot be given him. In such, and similar cases, the statute might work irreparable mischief, if the courts had not the discretion to enlarge the time; and the same evils might result if a default incurred could not be set aside.

The court trying a cause can always control it, by setting aside any interlocutory, or even final judgment, and we can see no reason for supposing that these means of preventing apparent injustice, may not be applied to the statute referred to.

As the setting aside the default, and reinstating the defendant's pleas, must be considered as the exercise of a discretionary power, it is no more the subject of revision here, than would the allowance of an amendment of pleadings, or the award of a new trial. We may remark, however, that this discretion ought never to be exercised, unless a satisfactory reason is shown for the omission to answer in proper time: and this, in all cases where it is practicable, should be accompanied with full and explicit answers.

3. The demurrer to the plea of the statute of limitations, was properly enough overruled, because there is nothing for the demurrer to act upon. The plea is not drawn out, but is interposed, by its name merely, with the consent, as the record states, of the parties. We can only remark, if parties will consent to this mode of pleading, they cannot afterwards be heard to complain, that enough is not stated. The only question which arises on such a demurrer is, whether the statute of limitations is an appropriate plea to an action of assumpsit. And in this aspect, we presume it is sufficiently answered.

4. The question, growing out of the refusal to allow the nomi-

nal plaintiff to be examined as a witness, is, we think, concluded by the decision of this court, in Stone, et al. v. Bibb, [2 Ala. Rep. 100.] The witness, in that case, was the plaintiff in the suit; but he was merely a trustee, having no interest whatever in the sum sought to be recovered, except a claim to commissions, which he relinquished to the *cestui que trusts*, and they deposited a sum in court sufficient to pay the costs. It was held, that he was not, nor could be made, a competent witness; and we then recognized, as a well settled rule, that parties to the record, liable for either direct or consequential costs, are interested in such a manner that none but the adverse party can extinguish the interest, and thus make the party competent as a witness.

The rule, which excludes a party on the record from being a witness in general, doubtless had its origin in the fact that such a party was always interested; but it is very questionable whether it ought not now to be supported from motives of policy. In modern times, so many ways have been devised of assigning and transferring choses in action, that there is danger, if the rules are further relaxed, that these may be created, as well as assigned, if the parties, to whom they are due, can establish their existence after transferring their interest to others. It may be said, when the chose in action is evidenced by a written promise to pay, that it may even now be established by the testimony of him to whom it is made, when he has assigned it to another, and also divested himself of all interest. However this may be, it is certain, in that case, that more checks exist than do when the contract is verbal only. We are aware of no decisions, other than those of Pennsylvania, and the circuit court of the United States for that district, where a plaintiff on the record has been allowed as a witness against the consent of the defendant. All the cases bearing on this question. English as well as Amercan, have been collected in Cowen & Hill's notes, [pp. 133 to 142 and 1548,] and the weight of authority seems to preponderate greatly against the admission of a party in such a case as this. Our conclusion, on this point of the case, is, that the nominal plaintiff was properly rejected as a witness.

3. The other remaining question is, whether the charge of the court, with respect to the operation of the statute of limitations, can be sustained. It appears, that in the general account of the plaintiff against the defendant, were two pieces of goods, of

which the price was agreed upon by the parties, but nothing was agreed as to the period for the payment; the general usage of the firm, and the custom of the merchants, known to all its customers, including the defendant, was, that goods, purchased during the season, were to be paid for at the end of the year.

It is insisted, that here the time of payment, as well as the price, was ascertained; and, therefore, so far as these goods were concerned, there was not an open account within the decision of Sheppard v. Watkins, [1 Ala. Rep. N. S. 62.] It is true, in that case, we came to the conclusion that the account was open, because the price was not agreed upon between the parties; but we apprehend this is not the only criterion by which an open account may be determined. In common parlance, an account is said to be open whenever there have been running or current dealings between the parties, which are kept unclosed with the expectation of further transactions between them. In such a case, it is obvious that the accounts are open, and while it remains so, it is within the statutory bar of three years. There was, then, no error in refusing the charge requested; nor is the one that was given obnoxious to the charge of misleading the jury.

Let the judgment be affirmed.

JOHNSTON, ADM'R, ET AL. v. THE HEIRS OF HAINESWORTH.

1. The case of Johnston v. Glasscock and wife, [2 Ala. 218,] reviewed and affirmed as to the necessary allegations in a bill filed to set aside a will admitted to probate by the county court.
2. As a general rule, the court of chancery should not direct an issue to be tried at law, unless the evidence is so conflicting as to make it difficult to attain any certain conclusion; but the statute appears to make the case of a bill filed to set aside a will, an exception to the general rule, and, and to give the chancellor the power to direct an issue whenever he thinks proper.
3. *Devisavit vel non* is an issue in fact.
4. An issue out of chancery ought not to be directed until the answers are in, and the testimony taken.

5. Infant defendants must be served with process, and the rules adopted in 1841 did not materially change the law in this respect.

6. Objections to the time of making a party must be made in the court below, or they cannot be raised in the appellate court.

ERROR to the Chancery Court of Washington.

The bill was filed by the defendants in error, to set aside a nuncupative will. The complainants allege that they are the heirs of James T. Hainesworth, deceased. That Levin Hainesworth, father of James T., departed this life subsequent to their father, leaving a large estate; a daughter, Nancy Philips, who, with their father, were the children of the first marriage; and a widow and four children, the product of the second marriage, all minors. That the orphans' court of Washington has admitted to probate a paper purporting to be the nuncupative will of the said Levin Hainesworth, by which the just claims of complainants and Nancy Philips were entirely excluded.

The bill further charges, that the testimony taken to establish said nuncupative will, does not show why a written will was not prepared and signed by the deceased. Nor do the proceedings of the court show that the persons present were called upon by the said Levin to witness that such was his will; and does not show but that the said nuncupative will was proved within fourteen days after the death of said Levin. That they had no opportunity of contesting the probate of said paper, not having had notice. That the estate was appraised at upwards of $16,000; and that letters of administration, with the will annexed, were granted, in 1833; and prays that James Johnson, the administrator, and the widow and minors be made parties; and further pray a division of the estate of the deceased, according to law, among the heirs.

The will and probate, from the records of the county court of Washington, are as follows:

"The last will and testament of Levin Hainesworth, of the county of Washington and State of Alabama, deceased, declared by him by word of mouth, the 3d Janury, 1833, viz: He gave all his real and personal property, which he died seized or possessed of, or right of recovery in chose or action, or otherwise, to his present wife, Martha Hainesworth, and his four children, which he has by said Martha, his wife, viz: my son Levin Hainesworth,

my daughter Sarah Hainesworth, my son William Hainesworth, and my son John Hainesworth, to be equally divided between them; to share, and share alike, of all the property and rights, as aforesaid, named or stated, to them, their heirs and assigns forever These were the words spoken by the said deceased, Levin Hainesworth, in his proper mind and memory, in his own house, and on his death-bed, in the presence of us, who have hereto subscribed our names as witnesses, 2d February, 1833.

DANIEL RAINE,
JOSEPH ANDERSON,
WILLIAM C. WILLIFORD.

State of Alabama, Washington county.—Personally came into open court, Daniel Raines, Joseph Anderson and William C. Williford, who being first duly sworn upon the holy Evangelists of Almighty God, upon their oaths did say, that they were present with the within named Levin Hainesworth, now deceased, at his own house, in his last sickness, and but a very short time before his decease, and heard him publish and declare his wish and desire in words to the same effect of those contained in the within instrument, which has since been committed to writing, and to which they have severally subscribed their names as witnesses; and they further state, upon their oaths, that the said Levin Hainesworth was, at the time of uttering said words, of sound mind and memory.

Sworn to in open court, this 11th day of February, 1833."

Subpoenas were executed on the widow and two of the minors, and on the administrator, who was afterwards appointed guardian *ad litem*.

The widow, administrator and *guardian ad litem* answer, stating, in substance, that the will was admitted to probate at the instance of the widow of deceased: that it was established on the proof offered, and which shows that the testator was in his proper mind; that it was in his own house, on his death bed *in extremis*; that no written will was made, because there was no person present capable of writing one, and there was not sufficient time to send for such person; that the complainants and Nancy Philips were excluded, because they had their full share of the estate in the life time of the testator.

Upon the coming in of one of the answers, the court directed

an issue at law to be tried, to ascertain whether the nuncupative will was valid or invalid.

On the 6th of October, 1835, the following agreement was entered:

It is hereby agreed, that the answer required to be filed in this cause by Johnston, administrator, be suspended, and further time granted to file the same up to the time of calling the said cause at the spring term, 1836, of this court; and that the said cause shall be tried upon the issue now made up, and such others as may be made; and either has leave to take testimony so far as relates to the chancery proceedings, on giving requisite notice.

From that time, the cause was continued generally, to await the trial of the issue at law, until the March term, 1841, when the following order was made:

In this case, the defendants, in conformity with the order of the court in chancery, submit the following issues, to wit: "Whether the nuncupative will of Levin Hainesworth, deceased, be valid or invalid"; and the said defendants aver that the said nuncupative will is valid, and this they are ready to verify.

BAYLEY & ERWIN, for defendants.

And the said complainants aver, that said will is invalid, and is no will; and this they pray may be inquired of by the county, &c.

PARSONS & COOPER, for complainants.

Upon this issue, the jury returned a verdict, "That the deceased made no nuncupative will": which was ordered to be certified to the court of chancery.

At the January term, 1843, the court, on motion, previous notice having been given, permitted the complainants to amend their bill, so as to make Nancy Philips a party complainant; and, also, to enter on the record an order, previously made, directing the transcript of the records of the circuit and county courts of Washington to be filed as evidence in the cause.

Upon the hearing, the chancellor decreed, that the verdict of the jury, on the trial of the issue, be established; that the nuncupative will of Levin Hainesworth, and probate thereof, be set aside, and his estate be distributed as in case of intestacy; and directed an account, &c.

The errors assigned are—

1. In not dismissing the bill.
2. In setting aside the will.

3. In decreeing against two of the defendants, on whom subpoenas had not been served.

4. In making Nancy Philips a party after verdict.

5. In sending the issue of *devisavit vel non* to the jury, before any depositions were taken, or before the cause was set for hearing.

John Gayle, for plaintiff in error. At the time this bill was filed, there was no rule of practice adopted as to service of process on infants; and, therefore, the English practice prevailed. It was necessary to execute the process, either on the infant, his parent or guardian, if within the State. The infants in this case may be over 14 years of age; and, therefore, entitled to select their own guardian.

Though a motion to amend, by making a new party, is received with indulgence, yet it is too late after an issue has been submitted to a jury, and their verdict returned. [1 Hoff. C. Pr. 284.]

A court of chancery may, in its discretion, send an issue to be tried by a jury; but where the facts can be sufficiently ascertained by the court, it is an abuse of its discretion to refer it to a jury. [5 J. C. 119; 6 id. 257.] It is never done, unless the evidence is contradictory, or nearly balanced. and a cross examination is necessary. [Hoff. C. Pr. 502, note; 3 Paige, 547; 3 V. & B. 42; 3 Merivale, 167, n.; 18 Vesey, 481; Fonblanque, 498.]

In England, the jurisdiction of the court of chancery over wills is incidental only; but in this State, under our statute, its jurisdiction is complete. If, then, a chancellor can send the case to a jury, where the issue is made up to try the validity of the will, and not to ascertain any particular fact, as whether the testator died at his own residence, or whether the will was made during his last sickness, the very object of the statute will be defeated.

Lastly, there is no equity in the bill. The stating part of the bill alleges but two causes of complaint: that it does not appear from the record of the county court, that there was no written will; and that the persons present were called on to bear witness to the nuncupative will. The relief prayed is, that the estate be distributed according to law—not that the will be set aside.

These are objections, not to the will, but to the record; and it would seem that the relief is expected, not from the defects of the will, but from the omissions of the judge of probate to place on the

record the matters before stated. It is admitted, in Johnson v. Glasscock, [2 Ala. 218] it was held, that it was not necessary in a bill to set aside a will, for the complainant to allege any thing more than the title by which he has a right to investigate the probate, and a prayer for relief; but he insisted, that the point did not arise in that case, and was, therefore, but a *dictum*, however well it appears to have been considered.

The bill, he contended, should contain such a statement of facts as, if admitted by the defendant, would enable the court to grant the relief prayed. All original bills require to be answered. The answer must be responsive to the bill; and the bill and answer, under our practice, form the issue. By requiring the party to contest the will in chancery, it must be presumed it was intended to require an adherence to the principles of courts of chancery; otherwise it might, with great propriety, have been left with the orphans' court.

The opinion, in that case, rests upon three assumptions —

1. That a probate, in our courts, answers to the probate, in common form, in the ecclesiastical courts.

2. That in the action of ejectment, brought to contest a will of real estate in England, the probate is not *prima facie* evidence in favor of the will.

3. That the bill in chancery here, is to accomplish the object of an ejectment in England, or the probate in solemn form; and, therefore, nothing more is necessary to be set forth in the bill than would be required in proof in the action at law, or the proceedings in the ecclesiastical court—that the complainant is heir or next of kin.

It is true, that the rules of evidence and its effect are the same in both courts; but the mode of proceeding is totally different. Thus, if ejectment be brought by the heir, a *prima facie* case will be made out by showing that he is heir, and if a fraudulent deed be set up, he may impeach it by proof; but if he file a bill to set aside the deed, he must not only show his title to recover, but his bill must set out the circumstances of the fraud. [Story's Eq. Pl. 214]

The difficulties, suggested in the opinion, that would arise from requiring the plaintiff to prove a negative, furnish no reason why he should not be required to allege it. This is very frequently the case in chancery, as where an instrument has been forged, or the

person making it is of unsound mind, or where the equity consists in a want of notice. In these and similar cases, though the allegation must be made, the burthen of proof is cast on the other party.

He further insisted, that the proof of wills in this State answered to the proof in solemn form in the ecclesiastical court. The citation of those interested in the will, the proof by witnesses, &c. all correspond with the probate of a will in solemn form in the ecclesiastical court. [1 Lomax on Ex. 97, 89; Clay's Digest, 303–4.]

If, then, an action of ejectment were brought in this State, to contest a will by the heir, as it undoubtedly might be, [Lomax' Ex'rs, 187; 1 Leigh, 287; 2 Rand. 198; 4 id. 585.] the probate would be conclusive. Or, if a will be offered for probate, and rejected by the probate court, this, as the decision of a competent judicial tribunal, will condemn it forever.

A will of real estate cannot be admitted to probate in England; and that is the reason why the probate cannot be admitted in an action at law.

Gibbons, *contra*. The subpoena to the mother and her children, is served on her and two of the children only. Afterwards a guardian *ad litem* is appointed for the other two, upon whom a subpoena is served, and who answers. The clear inference is, that the two, not served with process, are of very tender years, and that service of process on them would be nugatory. Besides, the subpoena against them was served on the mother. The answer, put in for them, contests the whole will, and the matter has been litigated for them from that day to the present.

As to the amendment, a bill may be amended at any time by adding parties. [1 Hoff. C. P. 284; 1 Smith's P. 295; 4 John. C. R. 363; Edwards on Parties, 17.]

There certainly cannot be error in sending an issue to be tried at law, when the statute gives express authority to the court to do so.

This case cannot, in principle, be distinguished from that in 2 Ala. 218; and it is not, therefore, necessary to reply further.

ORMOND, J.—This bill was filed previously to the decision of this court in Johnston v. Glascock and wife, [2 Ala. 218.]—

Before the decision in that case, some uncertainty prevailed as to the necessary allegations in a bill contesting the validity of a will, which the county court had admitted to probate. In that case, it was held that it was sufficient for the heir at law, or next of kin, to allege the title by which the right to investigate the probate was derived, and the prayer for relief. The bill in this case, though not very technically drawn, contains substantially these requisites, and is therefore sufficient.

The point just cited, has been controverted with great earnestness by the counsel for the plaintiff in error, but after again considering it, we are satisfied it was correct.

It is supposed that a bill of this description, is like any other bill in chancery, and governed by the same rules. To a certain extent, this is doubtless true—if those claiming under the will, admit its invalidity, it would be unnecessary to proceed further, except to distribute the estate. But if the allegations of the bill are denied, must their correctness be ascertained by the proof of two witnesses? This would certainly defeat the very object the Legislature had in view—a new trial of the validity of the will—it is in effect, a mere offering of the will again for probate, by those claiming under it. and upon them the burden lies, of proving it.—We think it, therefore, clear, that the quantity of proof necessary to be adduced to support the original probate, cannot depend on the answer of those claiming under the contested will. If then the denial in the answer of the allegations of the bill would not affect the proof necessary to be adduced, it goes far to show that such allegations are unnecessary; the whole design of the legislature being to open the probate of wills in certain cases. and to require those claiming under them, again to establish their validity.

It is also urged, that the issue which in this case was directed to be tried by a jury, was improper; that the jury could not pass on the entire question of the validity of the will, although it might settle or ascertain some disputed fact.

The general question of issues out of chancery. was expounded by this court in Kennedy v. Kennedy, [2 Ala. 571,] in which the right and the duty of a court of chancery to determine questions of fact, is explicitly asserted; and that it should not award an issue to be tried at law, unless the proof was so conflicting as to make it difficult to attain any certain conclusion. The case of

an heir at law, contesting the validity of a will, has, however, in England, always constituted an exception to this rule. [2 Ala. Rep. 625, and authorities there cited.] The statute, too, under which this proceeding was had, gives the chancellor the power of directing an issue in fact, whenever he thinks proper, and we think it cannot be questioned that *devisavit vel non* would be an issue in fact, within the meaning of the statute.

The objection that the issue was directed before the testimony in the cause was taken, and even before all the answers were in, is a more serious one. Until the testimony is taken, it cannot be known whether any conflict will arise, so as to make it necessary to refer the decision to a jury, and it is premature to direct one previously. [Hoff. C. P. 502.] We do not see that this case forms any exception to the rule. If, however, this were the only error in the record, it might perhaps be cured by the subsequent agreement of the parties.

The omission to serve the process on two of the infant defendants, is a fatal error. The rule of chancery practice, [Clay's Digest, 612,] requires all subpoenas on resident infant defendants over fourteen years of age, to be executed on them personally, and if under that age, upon those who have the charge of them. These rules were adopted in 1841, many years after these proceedings took place, but they are not materially variant from the law, as it existed previously. [Walker v. Hallett, 1 Ala. Rep. 390.] Here the subpoena was not executed on two of the infants, but as it was executed on their mother. it is insisted that we must presume they were under fourteen years of age. No presumption or intendments can be made against infants. For any thing shown to the contrary, they may have been over fourteen years of age, and indeed it does not appear by the record, that they have had constructive notice by a service of the subpoena on any one having the custody of their persons.

The amendment of the bill by making Nancy Philips a party after verdict upon the issue at law, was an irregularity, but no advantage can be taken of it in this court, as it does not appear to have been objected to in the court below, which will be held to be a waiver. This was so decided in the cases of Batre v. Auze's heirs, [5 Ala. Rep. 173,] and Erwin v. Ferguson, [ib. 158.]

Let the decree be reversed, and the cause remanded for further proceedings.

WALKER, ET AL. v. THE BANK OF MOBILE.

1. If the mortgagee has indorsed the notes and assigned the mortgage by which they were intended to be secured, he is not *prima facie* a necessary party to a bill brought for a foreclosure; and a bill which makes his heirs parties, must show their interest by proper allegations, and should contain a prayer for relief and process against them.
2. Non-resident defendants, who are infants, must be notified by publication, &c. as if they were adults, and until this is done, the appointment of a guardian, *ad litem*, is irregular.
3. A court of chancery may rescind an order appointing a guardian *ad litem*, made pending a cause there, where another person had been previously appointed, who filed an answer for the infants.
4. The act 1805, which provides that before a decree shall be rendered against a non-resident defendant, the complainant shall execute a bond for his indemnity, if he should appear and petition for a re hearing, impliedly requires that the bond should be made payable to all the defendants, (where there are several) who are non-residents.
5. A prior or subsequent incumbrancer, although a proper, is not an indispensable party to a bill for the foreclosure of a mortgage.
6. Where infants are defendants to a bill of foreclosure, the master should ascertain and report whether it was for their interest to sell the mortgaged property in separate lots, whether a division can be conveniently made, and which parcel their interest requires should be sold: *Further*, that he should report such a statement of the evidence as would enable the court to judge of the justness of his conclusions, if questioned.

WRIT of error to the Court of Chancery for Mobile.

The defendant in error filed a bill against the plaintiff Walker, on the seventh March, 1840, setting forth that the defendant below, Geo. J. S. Walker, made his five promissory notes, bearing date the twenty-second day of May, 1835, payable to Henry Hitchcock, deceased, and negotiable at the Bank of Mobile.—These notes are as follows, viz: The first for the sum of $10,800, payable one year after date; the second for $11,600, payable two years after date; the third for $12,400, payable three years after date; the fourth for $13,200, payable four years after date, and the fifth for $14,000. On the day on which these notes were made, the maker executed a mortgage in favor of the payee on real estate situate in the city of Mobile, for the purpose of securing their payment.

It is further stated, that the second, third, fourth and fifth notes were before maturity indorsed by the payee, to the complainant, and that the mortgage was transferred accordingly, by a deed bearing date the 30th of July, 1838; that although they have become due and payable, neither the maker or assignor has paid them, in consequence of which, the legal estate to the mortgaged premises has become vested in complainant. It is also stated that Henry Hitchcock has died, leaving Ann Hitchcock, his widow, and Caroline, Henry, Ethan and Andrew, his children and heirs at law; and that Isaac H. Erwin has taken letters of administration on his estate.

With a view to foreclose the equity of redemption of Geo. J. S. Walker, the bill prays that he be made a defendant; that a subpoena issue, commanding him to appear and answer the bill, and upon his failure to do so, or in the event of his answering, then the claim of the complainant be referred to the master to ascertain and report what is due thereupon. *Further*, that a foreclosure and sale of the mortgaged premises may be decreed, and that such other relief may be granted as is agreeable to equity.

On the same day when the bill was filed, a subpoena issued for the defendant Walker, on which there is an acknowledgment of service, subscribed with his name. On the 27th of May, 1840, an order was made for publication as to Mrs. Hitchcock and her children, all of whom are described as infants residing without this State; and their names inserted in the bill.

Walker answered the bill, admitting that he made the notes and mortgage, as stated by the complainant, alleging that in 1838, he conveyed his entire interest in the mortgaged premises, to Henry Hitchcock, who entered into the possession of the same, and died seized thereof, having first made, as the defeneant is informed, a devise of all his real property. This defendant concludes with a disclaimer of all right to the land in question when the bill was filed, or at any time since.

On the 8th of January, 1841, an *alias subpoena* was served on Isaac H. Erwin. We find in the record a notice in due form from the register, addressed to I. H. E., informing him that he was, at the spring term of the court of chancery, holden in 1840, appointed a guardian *ad litem* of the children of H. Hitchcock, and on the 13th of May, 1841, he filed an answer for himself and these

infant defendants. In their answer it is stated that Henry Hitchcock by deed, conveyed a large portion of the premises in question to Silvia Dole, to secure the payment of twelve thousand dollars, according to the effect of notes described in the same; which debt it is beleived, is still due and unpaid, and that Silvia Dole has a valid operative claim on the property embraced by her mortgage. *Further*, that James Erwin asserts that he is the proprietor of one of the notes described in complainant's bill.—These defendants do not admit that any part of the debt specified in the notes and mortgage is due, and pray that full and strict proof may be required.

It also appears from the record, that Robert D. James was, on the 28th November, 1840, appointed a guardian *ad litem* of the infant heirs of H. Hitchcock, dec'd, that notice of his appointment was served on him, on the first of February, 1841; and that he filed an answer for the infant defendants, on the 11th of November, 1841, in which he denied all knowledge of the matters stated in the bill, and called on the complainant for strict proof.

It was shown to the court by affidavit, and the production of a printed copy, that the order of publication as to Mrs. Hitchcock and her infant children, which was made at the spring term of 1840, was regularly published, according to its requirements, for six consecutive weeks in a newspaper, and by placing the same on the door of the court house of Mobile.

At the spring term in 1840, a general order was made, giving leave to amend by making additional parties: Under this order, the names of Mrs. Hitchcock and her children were inserted—and at the spring term in 1841, another order was made, giving leave to the complainants to amend the bill by making Silvia Dole a defendant. At the succeeding term, this latter order was set aside on complainant's motion—the chancellor being of opinion, that as Silvia Dole was a subsequent incumbrancer, she was not a necessary party.

On the 18th November, 1841, the notes and mortgage were produced and proved, and together with the bill, answers, &c. referred to the master to ascertain the amount due to the complainant on the mortgage; on the next day the master reported that the three last notes described in the bill, with interest thereupon, were due. The defendant Walker, excepted to the report, because he had not had notice of the time and place, when the ac-

count would be taken; and on the 14th April, 1842, this exception was overruled, and Walker appealed.

On the 5th of April, 1843, on motion of the complainant, the order of reference and the appointment of James as the guardian *ad litem* of the infant defendants, were set aside, and the acceptance of the service of subpoena by Walker, was duly proved. It was at the same time ordered, that the bill be taken as confessed, as to Mrs. Hitchcock, who had failed to answer the same in compliance with the order of publication; thereupon, the original mortgage and notes being produced and proved to the court, it was referred to the master to take an account and report during the term, what was due on the mortgage and notes; and also, to ascertain whether the mortgaged premises should be sold entire, or in separate parcels, so as best to promote the interest of the defendants. On the 8th of April, being a subsequent day of the term, the court permitted the resolution adopted by the President and Directors of the Mobile Bank, on that day to be filed, which authorized the president thereof, to affix the seal of the corporation to any bond required by the court, in cases in which it was a party. The court thereupon made an order, that the master accept of the Bank, and Wm. R. Hallett as surety, in the refunding bonds required at its then term, in double the amount reported to be due in any such cases. On the 12th of April, a bond was executed, according to the previous order, by the Bank as principal, and Hallett as surety, in the sum of sixty-nine thousand two hundred dollars, payable to Mrs. Hitchcock and her children, Caroline, Ethan and Andrew, reciting in the condition that the complainant had filed its bill, &c., against Mrs. H. and her children, Caroline, Ethan, *Henry* and Andrew, and others; that herself and children had been made defendants by publication; and conditioned, that if the complainant shall abide such decree, touching the restoration of the estate, or effects to be affected by the decree which the court may make, on the appearance or petition of the defendants named above, to have the cause re-heard, then the bond shall be void.

On the 14th of April, 1843, the master reported that he had notified J. A. Campbell of counsel for the defendants, of the time and place when he would make up and state the account; that the note for $11,600, due in May 1837, had been paid, but the three last notes, with the interest accruing, were still due. *Further,*

that the mortgaged premises should be sold in separate lots, viz: The property on the west side of Water street, should be sold in one lot, and the property east of water street, should be sold in another parcel; that in this manner it would sell to the best advantage. It is also stated in the report that the parties had due notice of its contents, had filed no exception, or made no objection thereto; and thereupon it was ordered and decreed, that the equity of redemption in the premises be foreclosed, unless, &c., and that the master proceed to sell the same in conformity to his report, at public auction, &c. *Lastly*, that the master make report of his proceedings at the next term, that a final decree may be rendered.

J. A. Campbell, for the plaintiffs in error, made the following points; 1 The heirs of Henry Hitchcock were not made parties in accordance with the rules and practice of the court of chancery—nor is there any allegation in the bill which charges them. [1 Ala. Rep. N. S. 379.]

2. There should have been proof of the ages of the heirs—no appointment of a guardian *ad litem* should have been made until after the publication of the order—and the rescission of the order appointing R. D. James, was irregular and void. [1 Ala. Rep. N. S. 379]

3. The refunding bond as it has been called, is not payable to all the absent defendants. [Erwin v. Ogden, Ferguson, et al. 5 Ala. Rep.]

4. Silvia Dole should have been made a party to the bill, in pursuance to the leave granted for that purpose. [1 Ala. Rep. N S. 598]

5. The master's report should have stated what part of the property should have been first sold; this was necessary to protect the interest of the infant defendants. [1 Ala. Rep. 391.]

P. Phillips, for the defendant.—1. The bill as originally filed, was against Walker alone, and the prayer was then adapted to it; it was afterwards, amended by inserting the names of Mrs. Hitchcock and her children, without making a corresponding charge in the prayer. This, however, was immaterial, as the parties could have had the benefit of every defence, to which, under any frame of the bill, they were entitled.

2. No affidavit of the infancy of the children of H. Hitchcock, was necessary—the decree affirms, that the chancellor was satisfied of the fact, and this is sufficient. [Levert v. Redwood.]—Though it may be more regular to appoint a guardian after the order of publication was published; but the rule cited for the plaintiff in error on this point, was enacted after I. H. Erwin was appointed in the present case. [Clay's Dig. 355.] The answer of the infants was not filed until after publication was made, and it was not objected that the appointment was premature; under these circumstances, the subsequent recognition by the court, of the guardian, is equivalent to a regular appointment. Irregularities are waived, where parties appear and proceed in the cause without objection.

3. Although the name of one of the absent defendants is omitted in the bond, yet the omission is cured by the condition, which recites the name of all of them.

4. Silvia Dole was not a necessary party. [Cullum, et al. v. Batre, 2 Ala. Rep. N. S. 415.]

5. The decree expressly recites that the parties had due notice of the report, &c. The report declares the proper order of sale, and the decree confirms it. It is believed that the objections presented to the proceedings of the court of chancery, are entirely technical, and such as an appellate court should not consider fatal.

COLLIER, C. J.—1. The bill as originally filed, was framed against the mortgager alone; and his answer, stating that he had conveyed to the mortgagee, his entire interest in the mortgaged premises, and disclaiming all right to the same, doubtless suggested the propriety of making the heirs of the mortgagee parties. Accordingly an order was made in general terms, giving the complainant "leave to amend by making additional parties;" and without filing a bill for that purpose, an addition was made at the end of the *stating part* of the bill already before the court, as follows, viz: "That the said Hitchcock has since deceased, and that Isaac H. Erwin has taken out letters of administration of said estate, and that the said Hitchcock, at the time of his death, left Ann Hitchcock his widow, and Caroline, Henry, Ethan and Andrew, his children and heirs at law." The bill itself does not show that the heirs of the mortgagee, have any interest in the matter

in controversy, but it expressly alleges that the mortgagee indorsed four of the notes, and transferred the mortgage to the complainant. Whether the allegation in Walker's answer, that he had conveyed all his interest in the mortgaged premises to the mortgagee, who took possession and died seized thereof, would be regarded as evidence of the fact on the hearing, we need not inquire. There was no attempt to disprove it, but the complainant, in order to obviate the objection of the want of proper parties, inserted in his bill the name of the mortgagee's wife and children, and proceeded against them as defendants to the bill; and the question is, whether the amendment was so made as to effect the object proposed.

If the mortgagee indorsed the notes and assigned the mortgage in question, *prima facie*, he would not (if living) be a necessary or even a proper party to a bill for its foreclosure; and a bill which joins his heirs under such circumstances, should contain suitable allegations, showing that their interests would be effected by the decree; and praying process of subpoena against them. This results from the rule that requires a plaintiff to state his case with such certainty and precision, as to show not only that he has a good cause of complaint, but upon what grounds he is asking relief against each one whom he has made defendant. The bill should be complete in itself, and so state the case, that the court may see what it is necessary to prove, and what decree may be rendered—its defects cannot be supplied by the answers or other part of the record. Applying these principles to the bill, and it will be seen, that the names of the mortgagee's real representatives are inserted, although the case stated shows that they have no interest; and further, that they cannot be regarded as parties, because there is no prayer to charge them as such, or process prayed against them.

But, for the answer of Walker, disclaiming all right to the mortgaged property; and averring that he had conveyed it to the mortgagee, and the attempt to bring the heirs before the court by an amendment, we should perhaps be authorized to render such a decree as the case required, without having any regard to them. In fact, if it were not for the answer, it would be quite immaterial, whether they were made parties or not; if omitted, the bill we have seen, would be regular, and as a decree might, upon the case stated, be so rendered as to do justice to all the parties, their

misjoinder would not be regarded at the hearing, or on error, unless the objection had been previously taken. [Story's Eq. Plead. 203, 232.] *Immaterial*, we mean so far as respects our action upon the record; for the interests of the mortgagees' heirs, if they have any, would not be divested by a decree to which they were not parties.

It follows, from what has been said, that the bill is defective in the particular we have been considering. 1. In not showing the interest of the heirs by proper allegations. 2. For the want of a prayer for relief and process against them. [Walker, et al. v. Hallett, 1 Ala. Rep. 387; Story's Eq. Pl. 43–4.]

2. In Walker, et al. v. Hallett, *ut supra*, it was determined that non-resident infant defendants must be notified of the pendency of the suit, by publication, as in the case of adults; if above the age of fourteen, they should be consulted in the appointment of a guardian *ad litem*, where it can be done without too much trouble and expense, of which the chancellor must judge: *Further*, the court may appoint guardians *ad litem* to non-resident infants, but such guardian should not be appointed in any case, until after service of process or publication.

The rules for the regulation of the practice in chancery, require that infants residing beyond the limits of this State, may be made parties defendants by publication, and sending a copy of the order to their parents or either of them, "if in life," and in case of death, upon the natural guardian of such infants. [Rules 3, 40, 41, Clay's Dig. 612–16–17.]

The appointment of Erwin as a guardian *ad litem* to the infant heirs of the mortgagee was made simultaneously with the order of publication; and was irregular, whether considered with reference to the case cited, or the rules of practice. It is needless to be more explicit upon this point; for if regard is had to our decisions, there will be no difficulty in avoiding error in the preparation of the case for hearing against the infant defendants. It was entirely competent for the court of chancery in its discretion to have rescinded the order appointing James a guardian *ad litem*.

3. The second section of the act of 1805, "empowering courts of equity to proceed against absent defendants"—Clay's Dig. 353, § 45, provides that the complainant, before obtaining a decree against a non-resident defendant, who has been brought in by publication, shall give good and sufficient security, in such

sum as the court may direct, to abide such order touching the restitution of the estate or effects to be affected by such decree as the court may make concerning the same, on the appearance and petition of the defendant. to have said cause reheard, &c." There can be no question that a bond taken under this act, should be made payable to all the non-resident defendants, and the omission of one of their names in the *teneri*, was doubtless a mere mistake, as indicated by the condition reciting all their names, and providing for the performance of the same duty in favor of each of them. Whether the defect in the form of the bond, is of such a character as would authorise a reversal of the decree, we need not consider, as it will not probably again occur.

4. In Cullum, et al. v. Batre's ex'r. [2 Ala. Rep. 420,] one of the questions was, whether a subsequent incumbrancer, was an indispensable party to a bill for the foreclosure of a mortgage.—The court said, "it was competent for the complainant to have proceeded against the mortgagors, without noticing either a prior or subsequent incumbrancer. The rights of the former are paramount, and those of the latter will not be concluded, *unless he is made a party*." This case is conclusive to show, that Silvia Dole, though she may be a *proper*, is not an *indispensable* party.

5. In Walker, et al. v. Hallett, *ut supra*, where the rights of infant defendants were concerned, the master reported that it was for the interest of the defendants to sell the estate in separate lots, *if it can be conveniently divided*. The court said, the master should have ascertained whether a division could be made, and which parcel it was most for the interest of the defendants to sell, &c.; that he should have reported such *a statement of the evidence*, as would enable the court to judge of the justness of his findings, if questioned by either party. The report of the master in the case before us, does not conform to the requirement of the law as laid down in the case cited, which will be readily perceived without a particular notice of the discrepancy.

It follows from what has been said, that the decree must be reversed, and the cause remanded.

HERNDON, USE OF WOODWARD, v. TAYLOR.

1 When suit is brought on a promissory note, in the name of the payee, for the use of another, and is produced in evidence at the trial, it ought not to be excluded, although it appears, from an indorsement upon it, to have been assigned to one not connected with the suit; the legal presumption in such a case is that the note has been returned by the assignee to his assignor.

WRIT of error to the county court of Benton county.

Assumpsit by Herndon, for the use of Woodward, against Taylor, on a promissory note by him payable to Herndon.

At the trial, the note was offered in evidence; but, it appearing from an indorsement upon it, to have been assigned by Herndon to one Smith, and by him to one Francis, the note was excluded from the jury, on motion of the defendant. The plaintiff here assigns this as error.

RICE, for the plaintiff in error, cited Pitts v. Keyser, 1 Stewart, 154; Dugan v. United States, 3 Wheat. 182; Evans v. Gordon, 8 Porter, 142; Grigsby v. Nance, 3 Ala. Rep. N. S. 347.

W. B. MARTIN, *contra.*

GOLDTHWAITE, J.—The note was improperly excluded in this case; and, even if it had been before the jury, would not have warranted an inference that the plaintiff was not entitled to sue. When a note is in the possession of one who appears to have previously transferred it, the legal presumption is, that it has been regularly returned to him. [Pitts v. Keyser, 1 Stewart, 154; Dugan v. United States, 3 Wheat, 182.] This is a presumption merely, which may be repelled by showing the legal interest to be with the party who is shown on the note as its assignee. If the person, for whose use this suit is instituted, is the *bona fide* holder of the note, there certainly is no reason why he may not disregard the endorsements, and use the name of the payee for the purposes of the suit; for he cannot sue in his own name, not being an indorsee.

Judgment reversed, and remanded.

BARROW, ADM'R, v. PAGLES, ET AL.

1. The omission to aver in a *scire facias*, to show cause why an execution should not issue on a judgment which had been affirmed in the Supreme court, *that the record of the judgment remained in the inferior court*, cannot be taken advantage of on demurrer, as special demurrers have been abolished by statute.

ERROR to the County Court of Mobile.

DARGAN, for plaintiff in error.
STANLY, *contra.*

ORMOND, J.—This case is, in all respects, like the one between the same parties, [p. 422.] except that it is not alleged that the affirmance of the judgment by the supreme court appears, by the certificate of the clerk. But the omission of *prout patet per recordum*, can only be taken advantage of, by special demurrer; [1 Chitty's Pleadings, 358;] and as by our statute, all special demurrers are to have only the effect of general demurrers, it results that the omission cannot be taken advantage of. Nor can any injury possibly result from this view, inasmuch as it will always be in the power of the defendant, by the plea of *nul tiel record*, to put the plaintiff on proof that there is such a record remaining in the court, out of which the *scire facias* issues.

Let the judgment be reversed, and the cause remanded.

LEWIS, ET AL. BY THEIR NEXT FRIEND, V. HUDSON, AND ANOTHER.

1. *Semble*, that where personal property is given to the *sole and separate* use of a *feme covert*, she may, as incident to such an interest dispose of it by will; and although she be entitled only to the profits derivable from the enjoyment of the property, she may, under an authority from her donor, declare who shall enjoy it after her death.
2. The bill alleges that the person entitled to a life-estate in slaves, is greatly indebted, judgments for a large amount have been recovered against him, and other suits are still pending; he has made an assignment of much valuable property; complainants have been informed that he is preparing to remove the slaves, and they are apprehensive they will be levied on, pass into the hands of strangers, and be carried without the State, so that they will lose their rights, or be compelled to assert them in a foreign jurisdiction; that he has been arrested in Georgia on several *ca. sas*, given bond and security to take the insolvent oath, to comply with the condition of which, and obtain his discharge, he will be compelled to deliver up the slaves; that a third person has interposed a claim to them, which is now litigated with some of the creditors of the person entitled to the present interest: *Held*, that these allegations shew such a danger of loss of the slaves, as to authorise a court of equity to entertain a bill *quia timet*, at the suit of those entitled in remainder.

WRIT of error to the Court of Chancery for Russell county.

The complainants filed their original, and an amended and supplemental bill against the defendants, Jonathan A. and Granberry Hudson, setting forth that Anderson Abercrombie, of the State of Georgia, did, on the —— day of July, 1831, convey to Charles Abercrombie sundry slaves, (whose names are particularly mentioned.) "To have and to hold to him, upon trust and confidence, to receive and pay the rents and hire thereof to Martha E. Abercrombie, to her sole and separate use, independent of the control of her intended husband, and during the natural life of her. the said Martha E." On the fifteenth of August, 1831, Martha E. Abercrombie intermarried with the defendant, Jonathan Hudson; and on the third of May, 1834, she made her last will and testament in writing, according to the laws of Georgia, where she then resided, by which she gave the slaves in question to her husband for life, and after that event, to be equally

divided between the children of Sarah Ann Lewis, who are the complainants. The will further provided, that in no instance were the slaves to be subject to sale for the payment of the debts of Jonathun A. Hudson.

It is furtner alleged, that the testatrix died on the 12th of June, 1834, without issue, leaving her will unrevoked and in full force; that the same had been proved, but the executor had since died, and no administrator had been appointed to succeed him in the execution of the will. The slaves are now in the possession of Jonathan A. Hudson, in the county of Russell, in virtue of the deed in trust for Mrs. Hudson, and her will subsequently made.

The complainants allege, that Jonathan A. Hudson is greatly embarrassed, that suits for the recovery of four thousand dollars and upwards have been instituted against him in the circuit court of Russell; that they are informed that judgments, for a very large amount have been recovered against him in the circuit court of Montgomery, as well as in Russell; that writs of *capias ad satisfaciendum* have been sued out in Georgia against him, for a sum exceeding two thousand dollars; *further*, that he has made an assignment of much valuable property.

It is further stated, that the complainants are informed that Jonathan A. Hudson is preparing speedily to remove the slaves in controversy: further, they apprehend that executions will be levied on them, and they will thereby pass into the hands of strangers, and be carried beyond the jurisdiction of the State, so that the complainants will entirely lose their rights, or be compelled to prosecute suits abroad for their recovery.

In the amended and supplemental bill, it is stated Jonathan Hudson is entirely insolvent; has been arrested in Georgia, on several writs of *ca. sa.*, and has entered into bond, for his appearance to take the benefit of the act for the relief of insolvent debtors; that according to the laws of that State, he will be compelled to deliver up the slaves in question in order to obtain his discharge. It is further stated, that Granberry Hudson has interposed a claim to these slaves, and that it is now in a course of litigation in the circuit court of Russell, between him and some of the judgment creditors of his co defendants, who have caused their executions to be levied on them.

The bills pray that process may issue, &c., requiring the seizure of each of the slaves, &c., and detain them in custody until

the defendants, their agent, &c., shall give bond with surety; conditioned to have them forthcoming to abide the decree of the court in the premises. An order was made in conformity to the prayer of the bill, the slaves seized and bond given; but, afterwards, on motion of the defendants, the bond was discharged, and the bill dismissed for want of equity, at the costs of the next friend of the complainants.

Belser and N. Harris, for the plaintiffs in error, made the following points:

1. A court of equity has jurisdiction in order to protect the rights of persons entitled to personal property on the death of an intermediate holder. This jurisdiction results from the necessity of the case, and because a court of law is incompetent to act efficiently. [4 Dess. Rep. 29.]

2. The ancient doctrine was, that one entitled to a remainder in personal estate, might compel him, in whom the present interest was vested, to give security that the goods be forthcoming at the determination of his right. [4 Dess. Rep. 29; 1 Brown's Ch. Rep. 274; 1 P. Wms. 1.] But by the more modern rule, the law has been relaxed in favor of the person having the first estate. [1 Brown's Ch. Rep. 279; 3 P. Wms. Rep. 336; 2 Paige's Rep. 132.]

3. Where there is reasonable ground for apprehension on the part of the remainder-man, the court will order the tenant for life to give security for the property. [2 Story's Eq. 141; 4 Dess. Rep. 26; 2 McC. Chan. Rep. 36; 2 Paige's Rep. 132; 1 Iredell's Eq. Rep. 134; 6 Ves. Rep. 172; Meek's Sup. 68, § 15.] Again: the complainants are infants, and entitled to the special protection of a court of chancery.

No counsel appeared for the defendants in error.

COLLIER, C. J.—It is perfectly clear, that the deed, by which the slaves in question were conveyed by Anderson Abercrombie in trust for Martha E., created an estate to her *sole and separate use;* in fact, it asserts, in terms most explicit, that such was the intention of the donor. This being the case, it was competent for her to dispose of them by will. [Henly v. Philips, 2 Atk. Rep. 49; Ross v. Ewer, 3 id. 160; 3 Bro. C. C. 8.] In Rich

v. Cockel, [9 Ves. Rep. 369,] the instrument expressed a trust for the separate use of the wife, without adding any power of disposition by deed, will or other writing. The Lord chancellor held, that as incident to such an interest, she might dispose of it by will. That although a married woman cannot, in contemplation of law, make a valid will, yet if she executes a writing, purporting to be a will of her separate property, a court of equity will treat it as such, and require it to be proved in the proper court before they will pronounce upon it; and probate will be granted without the assent of the husband. [Wagstaff v. Smith, 9 Ves. Rep. 520.] Whether, in the present case, the donee took such an interest in the slaves as would authorize her to dispose of them by will, we need not inquire; for, conceding that she was only entitled to their hire or earnings during her own life, she was expressly authorized by the donor to declare by will, in whom they should vest after her death. Without adding more on this point, we will proceed to inquire whether the facts disclosed in the bill, warrant the interference of chancery for the protection of the complainant's rights.

Where a specific legacy is given to one for life, and after his death to another, the legatee in remainder was formerly entitled, in all cases, to come into a court of equity, and have security from the tenant for life for the delivery of the legacy to the remainder-man. But the modern rule is not to entertain such a bill, unless there be some allegation and proof of waste, or of danger of waste of the property. Without such ingredients, the remainder-man is only entitled to have an inventory of the property bequeathed to him, so that he may be enabled to identify it; and when his absolute right accrues, to enforce its due delivery. [1 Story's Eq. 562; Foley v. Burnell, 1 Bro. Ch. Rep. 379; Slanning v. Style, 3 P. Wms. Rep. 336; Covenhoven v. Shuler, 2 Paige's Ch. Rep. 132.]

Mr. Justice Story says, in all cases "where there is a future right of enjoyment of personal property, courts of equity will now interpose, and grant a relief upon a bill *quia timet*, where there is any danger of loss or deterioration, or injury to it in the hands of the party who is entitled to the present possession. [2 Story's Eq. 140–1–2–3, and note 1; Randolph's adm'rx v. Kinney, &c., 3 Rand. Rep. 397; Latimer, et al. v. Elgin, et al. 4 Dess. Rep.

28–9–30; 1 Eq. Cases Ab. 360; Fearne on Rem. 414–15; Mad. Ch. 218; Lamb v. Wragg & Stewart, 8 Porter's Rep. 83.]

The grounds, upon which the interposition of equity is asked in the case before us, are—1. That the person entitled to a life estate in the slaves, is greatly embarrassed with debts, and judgments for a large amount have been recovered against him, and suits, for the recovery of more than four thousand dollars, are still pending. 2. He has made an assignment of much valuable property. 3. The complainants have been informed, that he is preparing speedily to remove the slaves in question. 4. They are apprehensive that executions will be levied on them, and they will pass into the hands of strangers and be carried without the State, so that the complainants will lose their rights, or be compelled to sue abroad for their recovery. 5. That Jonathan A. Hudson is entirely insolvent—has been arrested in Georgia on several writs of *capias ad satisfaciendum*—has given bond for his appearance to take the benefit of the act for the relief of insolvent debtors; and according to the laws of that State, will be compelled to deliver up the slaves in controversy in order to obtain his discharge. 6. That Granberry Hudson has interposed a claim to them, which is now in a course of litigation between him and some of the judgment creditors of his co-defendant, in the circuit court of Russell.

Whether the bill, as originally filed, was such as authorized the precautionary or preventive redress which it sought, we will not inquire, as we think, what is called the amended and supplemental bill, presents a proper case for equitable interference. In the posture in which the case comes before us, we must take all the allegations of the complainant to be true This being the case, we are to suppose that Jonathan A. Hudson is insolvent—has been arrested on *ca. sas.* in Georgia—has given bond to take the insolvent oath, and that the laws of that State are such as they are alleged to be. It cannot be intended that the bond was given merely to obtain a temporary discharge from confinement; and it is quite as fair to infer that the principal obligor contemplated a literal performance of its condition, as that it was his purpose to satisfy the execution by the payment of the money. In fact, the latter presumption cannot be indulged consistently with the idea of insolvency. The execution of the bond, when considered in reference to the laws of Georgia, is equivalent to an

avowal of intention to remove the slaves into that State, that they might be there sold for the payment of the obligor's debts. The allegation on this point shows, that the rights of those in remainder are in jeopardy, and require protection.

Again: the assertion of a right to the slaves, by G. Hudson, and the litigation thereof with the judgment creditors of his co-defendant, is, in itself, a strong circumstance in favor of the relief sought. But whether this, and the grounds stated in the original bill, are sufficient to sustain the jurisdiction of the court of chancery, is an inquiry which we need not make; coupled with the ground already noticed, they detract nothing from its force, but greatly strengthen and support it. It follows from what has been said, that the chancellor erred in dismissing the bill for the want of equity. His decree is, consequently, reversed, and the cause remanded.

COBB v. FORCE, BROTHERS & CO.

1. It is irregular to join two distinct matters of abatement in the same plea, and such a plea is bad on demurrer.
2. In an attachment by one non-resident against another, the affidavit should show that the defendant has not sufficient property within the State of his residence to answer the debt, within the belief, as well as within the knowledge of the person making the affidavit; and such a defect is sufficient to abate the attachment, when pleaded.

WRIT of error to the Circuit Court of Randolph county.

Assumpsit on two promissory notes. The suit was commenced by attachment. The affidavit was made by an agent, who swears that the defendant is a non-resident, and that he has not within the State of his residence, within the *knowledge* of the affiant, sufficient effects whereof to satisfy the debt, &c.

The bond for the attachment, is of the same date with that process, and is approved by "Wm. H. Cunningham, clerk."

The defendant pleaded two pleas in abatement. The first craves oyer of the attachment and affidavit, and then asserts, that on the identical day that the first was issued, both plaintiff and defendants were non-residents; that no bond was approved before the issuance of the attachment in the manner required by the statute, i. e., the plea negatives all the requirements of the statute; also, that no affidavit was made in the terms of the statute, i. e., the plea negatives all the requirements of the statute. The second plea craves oyer in like manner, but extends only to the affidavit. The plaintiffs demurred to these pleas, and the demurrer being sustained, the defendant refusing to plead over after judgment of *respondeas ouster*, final judgment was rendered.

The overruling of these pleas is now assigned as error.

S. F. Rice and W. B. Martin, for plaintiffs in error, cited Clay's Digest, 57, § 9, and insisted,

1. That the affidavit was bad, inasmuch as it does not allege that the defendant had no effects, in the State of his residence, wherewith to satisfy the plaintiffs' debt, within the *belief* of the affiant, as well as within his *knowledge*.

2. That it did not appear that the bond was approved by the clerk of the circuit court, *before* the issuance of the attachment.

Heydenfeldt and T. A. Walker, *contra*, argued that both of the pleas were double, the setting out two distinct causes of abatement, but one of them, the omission to approve the bond, is immaterial; and the other is purely technical.

GOLDTHWAITE, J.—1. The pleas in this case show, that the attachment was sued out under the 9th section of the act of 1833. That extends the benefits of the general attachment law, to non-resident creditors, but provides also, that such "shall give good and sufficient security, residing within the State, to be approved of by the judge of the county court, where the property or effects may be, or by any judge or clerk of the circuit court, for the amount, and with the like condition as required in other cases; and that in addition to the oath now required by law, such non-resident plaintiff, his agent or attorney, before obtaining such attachment as is authorised by this act, shall swear that the defendant, against whom such attachment is sued out, has not suffi-

cient property within the State of the residence of the defendant, within the knowledge or belief of such non-resident plaintiff, his agent or attorney, wherefrom to satisfy such debt or demand.—[Clay's Digest, 57, § 9.]

We think the first plea presents two distinct grounds of defence, if we consider the allegations as setting up an entire omission to give the bond required by statute, and this is the view we take of it, because no oyer is asked of the bond which appears in the record. It then sets up as a defence, two distinct facts. 1. That there is no sufficient affidavit; and 2d, that there is no bond whatever. The first of these objections, if true, is a fatal defect, but the second, conceding it to be also true, could be obviated by giving a sufficient bond. If then, an issue was taken on this plea, and a sufficient affidavit shewn, but no bond whatever, it would be difficult to say what the finding or judgment should be. The rule is, that a plea is double, when it states two or more facts, either one of which would constitute a defence. [Chitty's Plead. 231, 447.]

2. The second plea, however, is good, for it applies only to the affidavit, and shows a fatal omission of a material requirement of the statute. It was considered as essential, that the party suing out the attachment, should state his want of *belief*, as well as his want of knowledge, that the defendant had sufficient property to answer the debt, within the State of his residence.—Indeed, it may well be presumed, that actual knowledge of the entire solvency and ability of a non-resident, to meet his debts, would scarcely protect him from this process, if it could be easily evaded by substituting an agent without such knowledge; if this agent was not also required to state an absence of all belief of the fact.

As the court below erred in overruling the second plea, the judgment is reversed, and the cause remanded.

HOGAN v. CARR & ANDERSON.

1. Upon the hirer of a slave refusing to provide necessary medical attendance for the slave, and insisting on his laboring when physically unable to do so, the owner may take possession of the slave for the purpose of having medical aid afforded him; and upon the refusal of the hirer again to receive the slave when restored to health, so as to be able to work, the entire amount of the hire is recoverable.

ERROR to the County Court of Marengo.

Assumpsit by the plaintiff against the defendants in error, on a promissory note.

Upon the trial of the cause, it was proved that the note sued on, was given for the hire of a slave, for one year, to the defendant Carr; and the defence was, that the plaintiff took the slave out of the pessession of Carr, about five months before the expiration of the year, for which he was hired.

The plaintiff, in excuse, offered to prove that, in consequence of mal-treatment by Carr, the slave was unable to continue at work, and required rest and immediate medical attention. And further, offered to prove by physicians, who were called at the request of plaintiff and Carr, that to continue the slave at work, in his then situation, would be at the extreme hazard of one of his legs, and, perhaps, of his life; and that they so stated in the presence of Carr. That the slave was scarcely able to stand from extreme physical debility; and that notwithstanding this, the defendant Carr refused to call in medical aid, or to give the slave rest, and declared he would continue him at work without regard to the consequences. The plaintiff further offered to prove, that he retained the slave only so long as was necessary for medical treatment; and that so soon as he was pronounced able to work by the attending physician, he was tendered to Carr, who refused to receive him. The plaintiff further offered to prove, that Carr was insolvent. All of which evidence the court rejected; and charged the jury, that the contract of hire was entire, and that the plaintiff, having put an end to it by taking the

slave away without the consent of Carr, before the expiration of the period for which the slave was hired, he could not recover any thing.

The jury found for the defendants; and the plaintiff now assigns for error—1. The rejection of the testimony. 2. The charge of the court.

PECK & CLARKE, for plaintiff in error.

ORMOND, J.—The hire of a slave, for a stipulated period, is a purchase of the services of the slave for that time, the reversionary interest remaining in the owner. The hirer, in addition to the express contract of the parties, which, in general, only provides for the price and time of service, impliedly stipulates, that he will treat the slave humanely, and provide for his necessary wants. That in sickness, he will provide necessary medical aid, and will not require him to labor when physically unable to do so. In the case of a hired horse, it has been held, that after the animal is exhausted, and has refused its feed, the hirer is bound not to use it; and if he does, and the horse is injured, it is a violation of the bailment, for which the hirer is responsible. [1 Niel Gow. 1.]

The conduct of the defendant, in refusing to provide the necessary medical aid, and in requiring the slave to labor when physically unable, was a violation of the contract of hiring, and being an injury to the reversion, authorizes the owner to rescind the contract, and repossess himself peaceably of the slave, or to consider the contract as still subsisting, and supply the necessary wants of the slave himself.

In Rasco and Brantley v. Willis, [5 Ala Rep. 38,] we held, that if a hired negro was employed by the hirer in such dishonest pursuits as necessarily to familiarize him to the commission of crime, and to debauch his morals, that the owner might rescind the contract, and resume the possession of his slave; the ground of the decision being the injury to the reversion, and the violation of the implied stipulation, that the slave should be employed in some honest pursuit. That the conduct of the hirer, in this case, was a violation of his contract, and threatened the destruction of the reversionary interest, is obvious from the mere statement of the case.

In Gibson v. Andrews, [4 Ala. Rep. 66,] it was held, that the master was under both a moral and legal obligation to supply the necessary wants of his slave. That this duty, which he owed both to the slave and the community, he could not absolve himself from by voluntarily permitting the slave to be absent from him, unless he provided some one to stand in the relation of master to him: and in that case, he was held liable for necessary medical services rendered to the slave, who was abandoned by the hirer.

Here, although the slave was not abandoned by the hirer, he refused to call in necessary medical aid, and required him to labor, though physically unable. It is not necessary to inquire whether, in this case, as in the one just cited, the owner would have been liable for medical services furnished without his request; as it is perfectly clear, that upon the refusal of the hirer so to do, he had the right to take the possession of the slave for the purpose of having medical aid afforded to him.

In this, it is difficult to see how the hirer could be prejudiced, as the owner was merely doing that which the hirer was under a legal and moral obligation to have done himself.

We have shown that the violation of the implied stipulations of the contract, authorized the owner to rescind it, when, according to the decision in Rasco & Brantley v. Willis, he would have been liable for the services actually performed according to the rate agreed on. We think, however, he might, if he chose, elect to consider the contract as still subsisting, by returning, or offering to return, the slave as soon as he was able to labor.

This right the hirer could not defeat by refusing to receive the slave when tendered. An offer to do an act, is equivalent to a performance, where the thing to be done is prevented by the party to be benefitted by it.

The result of this examination is, that the court erred in its charge to the jury, as well as in the rejection of the testimony proposed to be given in evidence; and its judgment is, therefore, reversed, and the cause remanded.

MANSONY AND McLOSKY v. TOULMIN.

1. The act of 1833, which authorises an officer levying an attachment, to require the plaintiff therein to execute a bond for his indemnity, should it afterwards appear that the property levied on does not belong to the defendant, does not give to the obligee a summary remedy on the bond; and the statutes of 1807 and 1827, in respect to bonds given upon the levy of an execution, cannot, by construction, apply to the case.

WRIT of error to the Circuit Court of Mobile.

This was a summary proceeding by notice, under the statute, at the suit of the defendant in error, against the plaintiffs as obligors, in a bond of indemnity. It is shown by the record, that the plaintiffs in error caused three several original attachments to be issued against the estate of George Harrington, all of which they placed in the hands of the defendant, as the sheriff of Mobile, to be executed. As an inducement to levy the same, the plaintiffs executed a bond to the defendant, conditioned to save him harmless against any action or actions, that might be brought for levying the attachments on the goods and effects in the store, then lately occupied by Harrington. The levy was made, but the goods attached were sold under attachments previously levied, and no part of the proceeds had been, or would be, appropriated to the payment of the debt claimed by the plaintiffs. A recovery had been had against the sheriff for the conversion of the goods, by persons wholly disconnected with any of the suits, on the ground that they were their property.

The record is voluminous, and presents other questions, but enough has been recited to make the opinion of the court intelligible. A judgment was rendered in favor of the sheriff, for the value of the goods seized by him, together with costs, &c.

STEWART, for the plaintiffs in error.
CAMPBELL, for the defendant in error.

COLLIER, C. J.—The twelfth section of the act of 1833, "concerning attachments," enacts, Whenever an officer may be

required to levy an attachment, he may require the plaintiff in the same, to execute to him a bond of indemnity for his security, if it should afterwards appear that the property levied on does not belong to the defendant. [Clay's Dig. 58.] The sixteenth section of the act of 1807, concerning executions, &c. provides that where a doubt shall arise, whether the right of property levied on by execution, is in the debtor, the sheriff may apply to the plaintiff, his attorney, &c. for his bond, with good security, for indemnification for the sale of the property seized, &c. [Clay's Dig. 210.] By the first section of the statute of 1827, it is enacted, that whenever a sheriff, coroner or constable, takes from the plaintiff in an execution, a bond indemnifying him for levying or selling property, the title to which is doubtful or disputed, if suit is instituted against him or any of his deputies, for making such levy or sale, he may give notice to the principal and sureties in the bond, of the pendency of the suit, whose duty it shall be to defend the same, and a judgment for the same amount, shall be rendered by the court, on motion, in favor of the sheriff, coroner, or constable, against the principal and surety in the bond, as may be obtained by the party suing such sheriff, &c. [Clay's Dig. 213.]

The acts of 1807, and 1827, apply in terms where property has been levied on by execution. In fact, both those enactments relate to the final process, the protection of sheriffs, &c. and it is clear, as well from their titles as subject matter, were not intended to embrace original attachments. If this were a question of doubt, the act of 1833 would furnish a persuasive argument in favor of our conclusion. For it may be asked, why was this statute enacted, if those of an earlier date subserved the same purpose? It shows that the legislature supposed that the matter for which it provides, was a *casus omissus* in its previous enactments.

If the language of the act of 1827, could by a liberal construction be held to extend to a levy or sale under attachment, yet the act of 1833, in authorising a bond of indemnity to be required by the officer levying an attachment, without providing a summary remedy by express enactment, or reference to the act of 1827, cannot be held to have adopted it by implication. The omission to provide the mode of proceeding in such cases, serves rather to show that it was not intended that any other than the or-

dinary common law remedies, should be adopted. Whether statutes affording a summary remedy, should not be strictly construed, it is unnecessary to inquire.

It follows from what has been said, that the obligee cannot recover on the bond in the case before us, by adopting the remedy prescribed by the statute of 1827. Whether the facts stated in the record, interpose a bar to an action prosecuted in the usual form, it will be time enough to determine when such an action shall have been brought, and the case is presented for our decision.

We have only to add, that the judgment is reversed.

McBARNETT AND KERR v. BREED.

1. When a suit is commenced by one for the use of another, in a justice's court, and an appeal is taken by the plaintiff, it is no defect if the name of the nominal party is omitted in the appeal bond.
2. The surety in an appeal bond is only liable to the extent of the penalty of the bond, and when that is only 5 25-100 dollars, this court will judicially notice that the costs must exceed that sum. It will therefore correct the judgment as a clerical mis-entry, and amend it so as to render judgment, against principal and surety, for the costs, not exceeding the penalty, and for the excess against the principal only, at the costs of the plaintiff in error.

WRIT of error to the Circuit Court of Randolph county.

This case was commenced in a justice's court, in the name of Frazier, for the use of McBarnett, against Breed. The defendant had judgment in that court, and recovered 2 dollars and 68 3-4 cents for his costs. McBarnett appealed to the circuit court, and executed a bond, in the penalty of 5 25-100 dollars, with the condition prescribed by statute, with Kerr as his surety. In this bond, the suit is described as one by McBarnett v. Breed, and Frazier's name is entirely omitted. In the circuit court, the judgment was also for the defendant, and is entered, that he re-

cover of the plaintiff, and Kerr, as his surety on the appeal bond, his costs of suit.

McBarnett and Kerr now prosecute the writ of error, and assign—

1. That the court erred in rendering judgment against Kerr on the state of facts disclosed by the record.

2. In rendering any judgment against Kerr on the record.

S. F. Rice, for the plaintiffs in error, insisted—

1. That the bond was not a statutory bond, in consequence of the omission of Frazier's name as plaintiff in the suit; therefore, no judgment can be given on the bond. [Quinn v. Adair, 4 Ala. Rep. N. S. 315.]

2. The judgment against the surety, under no circumstances, could properly have been for more than the penalty of the bond; and the court knows, judicially, that the costs of such a suit must exceed the penalty inserted in this.

W. B. Martin, *contra.*

GOLDTHWAITE, J.—1. The omission to set out in the appeal bond, that the suit was in the name of Frazier for the use of McBarnett, is a matter of no importance whatever, because the latter is to be considered as the actual plaintiff, and is the only one who could enter into the bond for the appeal. This will seem entirely clear when our statute, providing that a suit shall not abate in consequence of the death of a nominal plaintiff, is considered. [Clay's Digest, 313, § 3].

2. In Quinn v. Adair, [4 Ala. Rep. N. S. 315,] we held, that the statute, requiring the party appealing from a justice's judgment to give bond and security for the appeal, applied as well to the plaintiff as to the defendant; but as the penalty of the bond is only to be in double the amount of the judgment below, it is evidently, in most cases, a very iusufficient security. The circumstance that it is so, will not, however, warrant us in saying, that the surety can be made liable beyond the penalty of the bond. Here, the penalty is only for 5 25-100 dollars; and although the judgment does not state the amount of the costs, we feel obliged judicially to notice, that they must necessarily exceed that sum.

The proper judgment, in this case, would have been, that the

defendant recover of the plaintiff and Kerr, his security in the appeal bond, the costs of this suit, not exceeding the penalty of the bond; and if the same shall be found to exceed the said penalty, then the excess beyond of the said plaintiff. As this judgment is a clerical mis-entry, which, under the statute, [Clay's Digest, 322, § 54.] could have been amended by application to the court below the, amendment must be here made at the costs of the plaintiff in error.

HODGES v. GEWIN, Adm'r.

1. A surety to a writ of error bond is not discharged from his liability on the bond because the principal in the judgment, after its affirmance in the appellate court, without the privity or consent of the surety, obtains an injunction out of chancery, to the collection of the judgment.

Error to the Chancery Court of Lawrence county.

The bill was filed by the plaintiff in error, and alleges in substance, that one Henderson, sheriff, and in virtue of his office, administrator of Peter W. Taylor, recovered a judgment in the circuit court of Lawrence, against one Thomas Coopwood, upon which, he prosecuted a writ of error to the supreme court, complainant becoming his surety in the writ of error bond. That the judgment was affirmed in the supreme court against Coopwood and himself. That afterwards Coopwood filed a bill in chancery, and enjoined the collection of all the debt except $1,400, the complainant being no party to the injunction bond. That this bill was dismissed and execution again issued against Coopwood, himself and the parties to the injunction bond, and insists that the execution of the injunction bond discharged him, he being a mere surety to the writ of error bond. The defendant in error is the successor of Henderson.

His honor the chancellor, dismissed the bill, considering that if the complainant was entitled to the relief he sought, it could be

obtained by motion to quash the execution in the court out of which it issued.

From this decree this writ is prosecuted.

CAMPBELL, for the plaintiff in error, cited 4 S. & P. 269.

McCLUNG, *contra.*

ORMOND, J.—The case of Winston & Fenwick v. Rives, [4 Stew. & Porter, 269,] determined that the sureties to a writ of error bond, by which a cause was carried from the county to the circuit court, were discharged by the execution of another writ of error bond, with new sureties, from the judgment of the circuit to the supreme court.

We do not propose to enter into an examination of the correctness of the principle laid down in that cause, because, since that decision was made, there has been a material change in the condition of sureties to bonds executed on obtaining a writ of error.

At the time the decision above referred to was made, a *scire facias* was necessary upon the bond, to make the surety liable, but by the act of 1826, [Clay's Dig. 310, § 26.] upon the affirmance of a judgment of an inferior court in this court, judgment is also rendered against the surety in the same manner, and for the same sum for which judgment is rendered against the plaintiff in error; and in the case of Wiswall v. Monroe, [4 Ala 9,] we held that the judgment of the inferior court was merged in the judgment of this court. In effect then, it is the same as if the surety had been a party to the original judgment, and his duties, rights and obligations, are precisely the same as those of the original defendant, as it regards the plaintiff in the judgment, although, as between himself and the original defendant, the relation of principal and surety may continue.

We are not called on in this case, to say whether the *merger* of the bond in the judgment, so completely identifies the surety with his principal, that he could not complain of a contract for delay between his principal and the plaintiff in the judgment. For be that as it may, we think it is perfectly clear that no such result can follow by mere operation of law.

The delay which is caused by the granting of an injunction, is neither in fact nor in law, the act of the plaintiff to the judgment; it is a delay caused by the act of the chancellor without his consent

and against his will. But if the surety be in fact prejudiced by the delay caused by the injunction, it is an injury resulting from his undertaking as surety to the writ of error bond, by which he agreed, that if the judgment was affirmed against his principal, it might also be affirmed against him. Whether he had the right of discharging the judgment, to prevent his principal by further litigation from increasing his responsibility, is a question not necessary to be determined, and is one in which the plaintiff in the judgment has no interest.

The further view taken by the chancellor is correct—that if the law was as contended for, the remedy could be obtained in the court out of which the execution issued by a *supersedeas*, and there was, therefore, no necessity to resort to a court of chancery.

Let the decree of the chancellor dismissing the bill, be affirmed.

Doe ex dem. LEVERICH & CO. v. BATES.

1. Where the plaintiff in a judgment receives a partial payment thereon, and agrees to *stay the same for six months*, and no execution issues until the expiration of that period, the agreement will be considered voluntary, and the lien of the judgment override and defeat a conveyance made by the defendant during the time the indulgence was granted.

Appeal from the Circuit Court of Mobile.

This was an action of ejectment for the recovery of a lot, with its appurtenances, situate in the city of Mobile. The cause was tried, under the usual consent rule, on the plea of "Not guilty"; a statement of facts was agreed to by the parties, and the court substituted instead of the jury. A judgment was rendered in favor of the defendant for costs.

From the case agreed, it appears that the plaintiffs' lessors recovered a judgment, at the June Term of the county court of Mo-

bile, against Joseph Bates, on a note for $4375; that the defendant in the judgment paid two thousand dollars, in part satisfaction thereof, and the plaintiffs "agreed that the judgment" should "be stayed for six months." On the third day of November, 1838, Joseph Bates conveyed the premises in question to John H. Fisher, in trust to pay certain debts, &c. The trustee, in virtue of an authority vested in him by the deed, on the 22d and 24th June, 1839, sold all the property conveyed to him by Joseph Bates, to the defendant, who was the highest bidder; and on the first Monday in July next succeeding, the sheriff of Mobile sold the part now in controversy, under an execution issued on the plaintiffs' judgment; and they became the purchasers.

STEWART, for the plaintiffs in error.
CAMPBELL, for the defendant.

COLLIER, C. J.—It is argued by the plaintiffs, that the agreement to stay proceedings on their judgment against Joseph Bates, for six months from the fourth of September, 1838, was made without consideration, and is, consequently, void. We understand it to be conceded, that the payment of two thousand dollars was not sufficient to sustain it; but it is insisted, that as the agreement was in writing, and the sheriff was directed to hold up the execution until the expiration of the time stipulated, and proceedings were accordingly suspended, no objection could be made to the insufficiency of the consideration.

It may be laid down generally, that a mere parol agreement, whether written or unwritten, requires a consideration to support it. [Mosby v. Leeds, 3 Call's Rep. 439; Burnet v. Bisco, 4 Johns. Rep. 235; People v. Shall, 9 Cow. Rep. 778; Cook v. Bradley, 7 Conn. Rep. 57; Roper v. Stone, Cook's Rep. 499.] But it is said, that it is not necessary the consideration should be expressed in the writing, and if not there stated, it may be proved *aliunde*. [Arms v. Ashley, 4 Pick. Rep. 71; Tingley v. Cutler, 7 Conn. Rep. 291.] In the present case, it was not attempted to support the writing by extrinsic proof, and the question is, whether intrinsically considered in reference to the suspension of execution which actually took place, it was obligatory upon the plaintiffs.

If the agreement was voluntary when made, the mere acqui-

escence of the plaintiffs cannot impart to it a different character in law. Although they may have been willing to indulge their debtor, by not coercing a collection of their judgment, yet it was entirely competent to have sued out execution at any time within six months, and the defendant could not have superseded it. This being the case, it is difficult to conceive why the writing should, after the expiration of the time for which it provided, have accorded to it a retrospective validity to which it was not previously entitled. In Thorne v. Deas, [4 Johns. Rep. 84,] it was held, that a promise, originally without consideration, will not be supported by the fact that the party, to whom it was made, has sustained some special damage. Here, from any thing shown by the record, we are not informed that the defendant has been injured, or the plaintiff benefited; and in point of law, we cannot conceive how such a result could have followed from the indulgence given to the defendant.

A voluntary restoration of what the law would compel one to restore, is not a sufficient consideration to support a contract. [McDonald v. Neilson, 2 Cow. Rep. 139.] So, a promise to one of two obligors not to call on him for more than half the sum due, is not binding. [Lemaster v. Burckharts, 2 Bibb Rep. 27.] And payment of part of a debt is not a sufficient consideration for a promise to forbear a suit for the residue. [Pabodie v. King, 12 Johns. Rep. 426; Hall v. Constant, 2 Hall's Rep. 185.] In Bates v. Starr,]2 Verm. Rep. 536,] it was decided, that a parol agreement between a creditor and debtor, founded upon no new consideration, that the former should not enforce a debt due in money, but receive payment for the same in professional or official services of the latter thereafter to be rendered, is not obligatory on the creditor, although the debtor may have extinguished part of the debt by services, under the agreement, and is willing to extinguish the whole in the same manner. An action, in such case, it is said, will lie at any time to recover the balance remaining unpaid. [But see Rutgers v. Lucet, 2 Johns. Cases, 92; Robertson v. Gardner, 11 Pick. Rep, 150; Bever v. Butler, Wright's Rep. 367.]

Let this view suffice to show, that the agreement to suspend execution was invalid for the want of a consideration; and that no *post factum* occurrence sustains it. This being the case, it follows that the judgment continued operative during the time it

was agreed that it should be stayed, and that the lien which it created upon the premises in question, is paramount to that of the deed of trust to Fisher.

The other questions discussed at the bar, are not indispensable to a decision of the cause; and we will, therefore, decline their consideration. It remains but to say, that the judgment is reversed, and the cause remanded.

NANCY, A SLAVE, V. THE STATE.

1. When a slave is indicted for an assault on a white person, with intent to kill and murder, and the verdict is "guilty of an assault with intent to kill" only, this will be considered as a finding of guilty of an assault with intent to kill, but not guilty of an intent to murder.
2. When a verdict is that the defendant is "guilty of an assault with intent to kill," without any other words, it will be referred to the charge in the indictment.
3. It is a capital offence for a slave to assault a white person with intent to kill, although if the intention had been consummated, the killing would have been manslaughter only.

WRIT of error to the Circuit Court of Montgomery county.

The indictment is against a slave for an assault with intent to kill and murder Mary Beasley, a white person.

The record of the trial and verdict is in these words, "whereupon came a jury, to wit: (here follows the names of twelve jurors) two thirds of whom being slave holders, who being elected, tried and sworn, well and truly to try, and a true deliverance to make, between the State of Alabama and the prisoner, Nancy, upon their oath do say, we find the said prisoner guilty of an assault, with intent to kill."

It is, therefore, considered, &c. (here follows a sentence of death by hanging, to be executed on the 30th day of December, now past.)

PRYOR, for the prisoner—insisted that the judgment of the court was not sustained by the verdict. It does not ascertain who she intended to kill, and is not responsive to the charge.

ATTORNEY GENERAL, for the State, argued that the verdict is sufficient, because it finds the essential requisites of the charge. Technical language is not necessary. [Chitty's Crim. Law, 644.]

Chap. 8, sec. 26, of the Penal Code, [Digest 442,] enacts that all indictments shall be good, if the offence be described as at common law. The addition of the words, "and murder," to the statutory offence, can neither avoid the indictment, or make it necessary to prove malice aforethought.

GOLDTHWAITE, J.—It is urged by the prisoner's counsel, that this conviction cannot be sustained. 1. Because the whole issue submitted to the jury, has not been responded to.—2. That the verdict is too inconclusive and uncertain to warrant any sentence. 3. Because the finding of the jury is for a different offence from that charged.

1. We shall consider these questions in the manner in which they are presented; and first, as to the objection that the jury has not responded to the entire issue submitted to them. We think the necessary intendment of this finding, is, that the prisoner is not guilty of an assault, with intent to commit murder, but is guilty of an assault, with intent to kill only. It is true, that Hawkins says, it has been adjudged, that if the jury upon an indictment or appeal of murder, find the defendant guilty of manslaughter, without saying expressly as to the murder, it is insufficient and void, as being only a verdict for part. [2 Hawk. 620, § 5.] But the only authorities cited for this, are some decisions in the early part of the reign of Elizabeth, and we cannot ascertain, not having access to the books quoted, whether the law was thus held in favor of the prisoner, or against him, on a second trial for the same offence. It was, however, highly probable, that these decisions were made against the prisoner, as at that period, the rights of the subject were not as clearly recognized as they afterwards were. In Darnley's case, [4 Coke, 40,] the defendant pleaded not guilty to an appeal of murder, was found guilty of manslaughter, and had his clergy. Afterwards, he was indicted for murder, and pleaded the former conviction, in the appeal at

the suit of the party. It was adjudged a good plea, for it was a good bar by the common law; and the reason is, that a man's life shall not be twice put in jeopardy for the same office. So in Hays' case, [Strange 843, Ld. Raymd. 1518,] the defendant was indicted for forging a bond, for publishing such bond, and for publishing a certain bond, knowing it to be forged, and the jury found a special verdict, that he forged a bond, and published the same, but said no more. The court supplied what the jury ought to have done, and found him guilty of the two first offences, and not guilty of the third. These cases satisfy us, that the omission to find the entire charge, will not vitiate the verdict, if it is sufficiently certain in ascertaining the guilt of the prisoner as to any one offence which is included within the charge laid in the indictment; as to all which is not found, the conclusion must be, that the jury intended to acquit.

2. It is true, the verdict here does not refer to the indictment, by saying that the jury find the defendant guilty of an assault, with intent to kill, as charged therein, but it would seem absurd to conclude that they found any other assault with intent to kill.

The finding is within the issue, and that can be concluded from it, so for an assault with such intent, is a crime. It is said, that incident and necessary circumstances, shall be supplied by intendment, as in a general verdict, all circumstances which warrant the finding, shall be intended. [6 Comyn, 254, § 31; State v. Poindexter, 6 Rand. 667.] We think the finding is sufficiently certain and conclusive, to warrant judgment if the facts found, constitute a capital crime.

3. And this brings us to the principal question, whether an assault by a slave on a white person, with intent to kill, under circumstances which would not make the killing murder, if the assault had been fatal, is a capital crime.

By the Penal Code, it is made capital for a slave to conspire the murder of any white person. So, likewise, is the voluntary manslaughter of a white person, and even the involuntary manslaughter, if in the prosecution of an unlawful offence. [Clay's Digest, 472, § 1, 2.] Nor are these enactments new, as the same have continued in our statute book since 1814. The part of the Code which defines the offence of which this prisoner is convicted, is in these words, "or commit an assault with intent to kill any white person, and be thereof convicted, shall suffer death."

It is evident, from the whole scope of these laws, that something more was intended than to make it capital for a slave to attempt to murder a white person. The mere conspiracy to do this, is made capital. No other construction then, can reasonably be given, than to infer an intention to punish capitally, any voluntary attempt by a slave, to take the life of a white person, although the attempt, if executed, would make a case of manslaughter only.

We come then to the conclusion, that there is nothing in the reasons urged against this conviction, of sufficient weight to authorise us to pronounce the sentence of the court erroneous.

We may also add, that we have examined the transcript for other grounds of reversal, as we are required to do by the 7th section of the 13th article of the Penal Code, but find none. The sentence of death must, therefore, be affirmed, and as the day of execution has already passed, we order and direct that the prisoner, Nancy, now in confinement in the common jail at Montgomery, be taken from thence on Friday, the —— day of March next, to the place of execution provided by law, between the hours of ten o'clock, A. M. and four o'clock, P. M., and that she be there hanged by the neck until her body be dead. And that the sheriff of Montgomery county be charged with the execution of this sentence.

McRAE v. TILLMAN, AND OTHERS.

1. In an action of forcible entry and detainer, the complaint described the land as "a part of the township 14, range 1 west, and section 9, S. W. qr. of 80"—*Held*, that the concluding part "of 80" might be rejected as surplusage, and that the true construction was, that the land described in the complaint was a part of the S. W. quarter of section 9, in township 14, range 1 west, and that this description, unaided by any thing in the verdict and judgment, rendering it more certain, was insufficient.
2. The allegation in the complaint that the complainant had lawful and peaceable possession of the lands for five years, is an allegation of such an estate as will support the action.

3. The recital in the record that the jury were duly sworn well and truly to enquire of said forcible and unlawful detainer, is sufficient, without stating that they were sworn to try the cause according to the evidence.
4. When the judgment of the justice is reversed by the circuit court, because the lands are not sufficiently described in the complaint, the cause should be remanded for the purpose of amendment.

ERROR to the Circuit Court of Sumter.

This was a proceeding for a forcible detainer, commenced by the plaintiff against the defendants in error.

In his complaint, he alleges, "that he was possessed of a certain messuage, with the appurtenances and lands, situate lying and being in and a part of the township 14, range 1 west, and section 9, S. W. qr. of 80, lying in the county aforesaid, having had lawful and peaceable possession of the said messuage and lands for the space of five years; and being so possessed," &c.

A jury was empannelled by the justice of the peace, whom, he recites, "were duly sworn well and truly to inquire of said forcible and unlawful detainer"; who, upon their oaths, said they found a verdict for the plaintiff. Upon this verdict, the justice rendered judgment for the plaintiff for costs.

The cause was removed into the circuit court, by *certiorari*, by the defendants, who there assigned for error—

1. The lands or premises sued for are not distinctly described in the complaint, or in any part of the proceedings.

2. That the complainant did not allege any estate in the premises.

3. The jury were not sworn according to law.

4. That the jury did not render a verdict according to law.

The circuit court sustained the errors assigned, reversed the judgment of the justice of the peace, and dismissed the complaint. To reverse this judgment, this writ is now prosecuted by the plaintiff, who here assigns for error—

1. The court erred in reversing the judgment on the errors assigned.

2. In not remanding the cause.

SMITH, for plaintiff in error.

LYON and MANNING, *contra*.

ORMOND, J.—The rule which prevails in England, and in many of the States of this Union, that in executing a writ of *habere facias possessionem*, the sheriff acts at his peril, and that, therefore, the premises need not be particularly described in the writ, does not obtain in this State. [Sturdivant v. Murrell, 8 Porter, 322, and Wright v. Lyle, 4 Ala. 112.] We are, then, to inquire, whether the description of the lands sought to be recovered in this proceeding, was sufficient to enable the sheriff to put the party in possession without danger of trespassing on the rights of others.

Rejecting, as surplusage, the concluding part of the description, "of 80," the only meaning that, by any reasonable construction, can be put upon it, is, that it is a part of the S. W. 1-4 of section 9, in township 14, range 1, west. This certainly conveys no distinct or definite idea of either the quantity or locality of the land sought to be recovered. In Wright v. Lyle, [4 Ala. 112,] the description was, "a certain messuage and parcel of land containing thirty acres, be the same more or less, adjoining Thomas B. Watts and others, in the county of De Kalb"; and that was held to be too vague and uncertain. Yet it is quite as precise, and in some respects, more certain, than the description in this case. We are, therefore, of opinion, that the complaint, unaided as it is by the verdict or judgment, is insufficient in not setting forth the part of the quarter section sought to be recovered.

It was urged by the defendant's counsel, that no estate in the lands is set forth in the complaint, but a bare possessory interest; and that the possession may have been acquired originally by a trespass. We do not think it necessary to inquire, at this time, whether a possession, which had been acquired by a trespass, could be recovered in this action; because we are of opinion, that the complaint sets out a legal estate in the premises. The language of the complaint is, that "he had lawful and peaceable possession of the premises for the space of five years"; which necessarily implies, that the land was held by some tenure which, by law, entitled him to the possession, the only matter necessary to be inquired into in this action.

We do not think it can be inferred from the language employed by the justice, that the jury were not sworn to try the cause according to the evidence. He does not attempt to state the terms of the oath administered to the jury, but merely narrates the fact that they were duly sworn, and as the contrary is not

shown by the record, we must presume they were sworn according to law.

It remains to inquire whether the circuit court erred in not remanding the cause for other proceedings.

The complaint, which the statute requires to be made, has been considered by this court as analogous to the declaration in other suits. Thus, in Bliss v. Winston, [1 Ala. 344,] it was held, that the entry might be stated in different parts of the complaint to have taken place on different days; and in Murry v. Harper, [2 Ala. 744,] that the complaint was amendable whilst the proceedings were depending before the justice, where the land had been improperly described. So, in Wright v. Lyle, [4 Ala. 112,] we held, that a defective description of the lands would be aided by the verdict and judgment, if there rendered certain. As, therefore, the complaint could be amended, the circuit court should not have dismissed the proceeding, but should have remanded the cause that the amendment might be made. And for this error, the judgment of the circuit court must be reversed, and the cause remanded to that court, that a *procedendo* may be there awarded to the justice of the peace.

POPE, ET ALS. CLAIMANTS, &c. v. MURRAY.

1. Four spars were *hired* for an indefinite period, to aid in raising a steam-boat that was sunk, for the use of each, the owner of the boat was to pay one dollar a day, and if they were "lost or injured," he was to pay at the rate of twenty-five dollars each, for three of them, and ten for the fourth: *Held*, that the terms "lost or injured," were to be understood in a popular sense, and although they were not *actually lost or injured*, the owner of the boat might, if he retained them, upon paying eighty-five dollars, the price agreed, avoid the payment of hire for the use of spars.

WRIT of error to the County Court of Mobile.

This was a proceeding by libel, under the statute, at the suit of the defendant in error against the steamboat W. W. Fry, her

tackle, apparel, &c. It is alleged, that since the first day of July, 1842, the libellant hired to that boat, while she was on the internal waters of this State, and for her use and on her credit, four spars, to be used in raising her from the bottom of the river, where she had sunk, at the rate of twenty-four dollars *per week;* that these spars were kept in the use and service of the boat for the space of six months and twelve days, and were not delivered to the libellant, although he has often demanded them; that they are valued at eighty-five dollars; and that an account of the particulars of the libellant's demand is annexed, the aggregate amount of which is seven hundred and nine dollars, &c.

Process was regularly issued against the W. W. Fry, under which the boat, with her tackle, apparel, &c., were seized by the sheriff of Mobile; whereupon, the plaintiffs in error entered into a stipulation, conditioned to deliver the W. W. Fry to the sheriff of Mobile, on, &c., or to pay and satisfy the decree that should be rendered on the libel. The claimants denied on oath the allegations of the libel; the cause was submitted to a jury on the proofs of the respective parties, and a verdict being returned for the libellant for the sum of one hundred and seventy-nine dollars, a judgment was rendered accordingly. On the trial, the claimants excepted to the ruling of the judge. The libellant proved, that the steamboat Fry, on her passage from Montgomery to Mobile, sunk in the Alabama river; that Pope, the owner, through King, his agent, applied to the libellant for four spars to aid in raising her; that King and Murray made the following agreement, viz: that King should have the spars for the purpose for which he wanted them, but the time when he was to return them was not distinctly stated, though he said he should need them from a week to twelve days. For the use of the spars, the owner of the boat was to pay a dollar per day for each spar, and if they were lost or injured, Pope was to pay twenty-five dollars for three, and ten dollars for one—in all eighty-five dollars. It did not appear that the spars were injured or lost, but they had never been returned to the libellant. The only evidence on this point, was that of King, who testified that Pope said, on leaving the boat, let them remain there, as he should want them again in attempting to raise her. The court charged the jury, that it was a material inquiry whether there was a sale or hiring of the spars; if

there was no sale of them, the plaintiff should recover the value, together with hire, according to the contract.

DARGAN, for the plaintiffs in error.
No counsel appeared for the defendant.

COLLIER, C. J.—Wherever the literal interpretation of a contract will defeat the object of the parties, resort must be had to construction. In expounding agreements, we must conform, as nearly as the rules of law will allow, to the apparent intention of the parties. Again: in the construction of all instruments, the court must accord to a particular expression a controlling force, but the intention must be gathered from the whole writing; unless it be manifest that its author intended otherwise. The undertaking of the boat was to pay one dollar a day for the use of each of the spars; and if they were lost or injured, to pay eighty-five dollars, the price agreed for the four. The obvious meaning of the parties was, that the owner should pay the stipulated hire for the spars, unless he failed to return them; in that event, he was to pay the sum which the parties had determined to be their value. The terms, *lost* or *injured*, are not to be construed in their strictest sense, and as excluding every other cause which may have prevented their return, but they are to be understood as having been used to express the idea of a failure to return the spars, without reference to any particular cause therefor. The subject matter and nature of the contract do not warrant the conclusion, that these words were intended to control the meaning of the parties, and that the sentence in which they are found should be literally interpreted. The popular sense is that in which we must suppose the parties intended to express themselves, without any special regard to etymology.

It was not intended that, in addition to the hire, (as it is called,) the spars themselves should be paid for, but the clear inference is, that if they were not returned, the property in them vested in the owner of the boat from the time the plaintiff parted with their possession, and by paying the stipulated price, the liability to pay the hire was extinguished.

In the view taken of the contract, it was not necessary for the jury to have inquired whether it was a hiring or a sale—the legal effect of it might be either the one or the other, as the owner of

the boat chose to treat it. In referring the inquiry to the jury upon this point, without informing them what was a sale and what a hiring, it may be questioned whether the county court did not err. But what has been already said, makes unnecessary the examination of the charge in this respect; and we will only add, that the judgment is reversed, and the cause remanded.

McCLURE, ET AL. v. COLCLOUGH, ET AL.

1. When the answer alleges that the complainants appeared to and defended a motion to render judgment against them as sureties to a sheriff's bond, although this fact, if true, would present a bar to relief in equity, yet it can only appear by the production of the record in aid of the assertion: and the injunction should not be dissolved on the assertion merely.
2. When the sureties of a sheriff, against whom a judgment, on motion, has been rendered, and they have filed their bill putting either the *factum* or legal sufficiency of the bond in issue, the injunction should be retained until the determination of the issue, or until the production of a record, by which the questions at issue are concluded.
3. It is no ground for resort to a court of equity by sureties on a writ of error bond, that the judgment had previously been affirmed on another writ of error, of which fact they were ignorant. If the second affirmance was irregular, they should apply to the court rendering it, to correct the irregularity.

WRIT of error to the Court of Chancery, for the 9th District of the Southern Division.

The statement of the case as made by the bill, sufficiently appears in the report of the same case at January term, 1843. The answer of the defendant, Colclough, having been filed, a motion was made to dissolve the injunction on the ground that all the equity of the bill was denied. The part of the answer, which covers the allegation of the bill, that the bond was never received and approved by the proper officer, is in these terms, "defendant is informed and believes, that the judge of the county court received the said bond and ordered it to be filed in the office as the official bond of the said McRae; and he submits that this in law

and in equity, is an approval." He also asserts, that the complainants had notice of the motion against the sheriff, and submits that the judgment obtained upon it, is an estoppel now to contest its validity. It is admitted that the judgment was never affirmed, and that Dansby and Campbell, the sureties to the last writ of error, were ignorant that a previous writ of error had been sued out.

The chancellor allowed the motion, and the complainants appealed from his order dissolving the injunction.

Buford, for the plaintiffs in error.
Harris, *contra.*

GOLDTHWAITE, J.—1. When this case was before us at a former term, [5 Ala. Rep.] on a decree dismissing the bill for want of equity, we considered the effect of the judgment upon the motion against the sheriff and his sureties, as not concluding the latter from asserting any defence which went either to the *factum* or legal sufficiency of the bond. The reasons which induce this conclusion with regard to a large class of cases, was sufficiently stated in Gibbs v. Frost, et al. [4 Ala. Rep. 720.]

We had previously held in several cases, that when the sureties chose, in the first instance, to resist the motion for judgment against them, they were at liberty to do so upon any ground of defence open to them. [Harris v. Bradford, 4 Ala. Rep. 214; Jamison v. Harper, 1 Por. 431.]

The consequence of these decisions would seem to be, that although the sureties cannot be compelled to litigate their rights, when the motion is made for judgment against them, yet if they claim their privilege to be then heard, and enter upon their defence, there is no reason why they should not be concluded to the fullest extent. In the case of a defence by the sureties, the record would necessarily declare the fact and the defect of the answer in reference to the denial or avoidance of the equity of the bill in this particular, is, that it undertakes to assert a fact which can only be properly shown by producing the record of the proceedings had upon the motion.

2. Another peculiarity grows out of our practice of allowing summary judgments against sureties without notice to them.—We have already shown, by reference to our decisions, that these

judgments can only be warranted by throwing open the contest with respect to their liability in another forum. It follows as a consequence, that whenever they put either the *factum* or the legal sufficiency of the bond in issue, the judgment upon the motion cannot be turned loose against them, without the determination of this issue. After an injunction is once allowed upon a proper showing in such a case, it ought to be retained until it is shown that their rights have been concluded by making an ineffectual defence upon a trial at law, or by a hearing in the court of chancery. Here, it is true, the defendant answers that the bond was received and filed in the clerk's office, and it is equally true, that this would warrant the presumption of an approval by the proper officer, but this is the matter in issue, and the assertion affords no ground to dissolve the injunction for the reasons before stated.

3. With respect to the admission by the defendant, of the supposed equity of the complainants, Dansby and Campbell, growing out of their ignorance, that a previous writ of error had been sued out, and the judgment then affirmed; it is necessary only to say, that these facts present no ground whatever, for the interference of chancery. If the second affirmance was irregular, the application to correct the irregularity, should be made here.

From what has been said, it will be apparent, that we consider the motion to dissolve the injunction, should have been denied.

Decree reversed, and remanded.

THE MADISON COLLEGE v. BURKE.

1. Upon a note made payable to the "Treasurer of the Manual Labor Institute of South Alabama," a suit cannot be maintained by *Madison College*, without an averment that it is the same corporation, and that the name had been changed since the making of the note, and before the institution of the suit.
2. In such a case, on making the proper proof, a recovery can be had on the money count.

ERROR to the Circuit Court of Wilcox.

Assumpsit by the plaintiff in error, against the defendant in error. The declaration contains a special count on a note for one hundred dollars, payable to the treasurer of Manual Labor Institute of South Alabama, and also the common counts.

The defendant demurred to the first count of the declaration, which was sustained by the court.

Upon the issue of non-assumpsit to the common counts, the plaintiff offered in evidence, a note of the defendant for $100, payable to the treasurer of the Manual Labor Institute of South Alabama, and having proved the signature, offered to prove that the property in the note was in the plaintiff, by proof of the incorporation by statute of the Manual Labor Institute of South Alabama, and the change of its corporate name, by a subsequent enactment, to that of Madison College, but the court refused to permit the note to be given in evidence. to which the plaintiffs excepted. And now assigns for error, 1. The judgment on the demurrer. 2. The matter of the bill of exceptions.

G. Gayle, for plaintiff in error—cited 2 Ala. 699; 1 Lord Ray. 153; Angel & Ames on Cor. 510–11; 3 Burr. 1866; 5 Dane's Ab. 151; 3 Levinz, 237.

Sellars, *contra.*

ORMOND, J.—The first count of the declaration is bad, because it does not show any legal title to the note sued on, in the plaintiff.

The allegation is, that the defendant executed a note to "the treasurer of the Manual Labor Institute of South Alabama," but this is no evidence of indebtedness to "Madison College." The facts were, that after the execution of the note, and before the institution of this suit, the name of the corporation was changed, by an act of the Legislature, to *Madison College.* The act provides, that the change of the corporate name shall not affect the right of the corporation to recover its debts, or release it from its engagements. And such would have been the law, if no such reservation had been made, as is shown by the corporation of Colchester v. Seaber, [3 Burr. 1865,] and if the count had contained an allegation of these facts, it would have been good.

But upon this proof, showing the change of the corporate name,

and that the defendant executed the note to the corporation, under its former name, it was entitled to recover under the money count, and for the error of the court in rejectting the testimony, the judgment is reversed, and the cause remanded.

LEWIS, ET AL. v. BR. BANK AT MONTGOMERY.

1. A statute provided that where a sale has been made of a sixteenth section, or a part thereof, which cannot by reason of the insolvency of the purchaser, or other cause, be made productive, a majority of the voters of the township, voting in township meeting, upon due notice given, shall have power, with the assent of the purchaser, to annul or cancel the contract of sale; *Held*, that a plea alleging that a majority of the voters of the township voting in township meeting, upon due notice given, did, with the assent of the purchaser, annul and cancel the contract of sale, because the same could not be made productive, was good, although it did not state the particular reason which induced the voters to assent to a rescission.

WRIT of error to the Circuit Court of Russell.

The defendant in error declared against the plaintiffs, in assumpsit, upon a promissory note, which is described as being dated the fifteenth day of December, 1840, payable twelve months after date, for the payment of two thousand three hundred and twenty-seven dollars and twenty-two cents, for the account of section 16, township 16, range 29, Russell county, negotiable and payable at the Branch of the Bank of the State of Alabama at Montgomery.

The defendants pleaded, that the note declared on, was given in consideration of the purchase of the 16th section, township 16, and range 29; that since the purchase of the same, and since the last continuance of this cause, a majority of the voters of the said township, voting in township meeting, upon due notice given, did, with the assent of the defendant, P. A. Lewis, who was the purchaser thereof, annul and cancel the contract of sale of said section, because the sale of the same could not be made productive.

To this plea, the plaintiff demurred, and the demurrer being sustained, the defendants refused to plead over; thereupon, a judgment was rendered in favor of the plaintiff, for the amount of the note, and interest, together with costs.

HEYDENFELDT, for the plaintiffs in error.
No counsel appeared for the defendant.

COLLIER, C. J.—The legal sufficiency of the plea, depends upon the interpretation of the first section of the act of 1843, "for the relief of the purchasers of sixteenth sections," [Clay's Dig. 529, § 49,] which is as follows: "Whenever a sale has been made of a sixteenth section, or part thereof, and such sale cannot by reason of the insolvency of the purchaser or purchasers, or from other cause, be made productive, a majority of the voters of said township, voting in township meeting, upon due notice given, shall have power, with the assent of the purchaser or purchasers, to annul or cancel the contract of sale for said section, or any lot or parcel thereof, which is not likely to be productive; and shall have power furthermore to re-sell, rent or lease the same, as if no sale had ever been made."

This enactment authorises a majority of the voters of a township to annul a contract (with the assent of the purchaser) for the sale of the sixteenth section, when from any cause it cannot be made productive, and it is not necessary to the validity of their decision, that they should declare the particular reason that influenced them. It is enough, that they have expressed their assent to a rescission in the manner prescribed; the legal inference, at least in the absence of any thing showing the contrary, is, that they acted in subordination to law, and were influenced by the consideration that the sale would be unproductive. This conclusion results from the nature of the thing done, the persons by whom, and the manner of doing it, and is well sustained by the general analogies of the law.

A plea by the purchaser to an action for the purchase money which sets up the cancellation of the contract as provided by the statute, need not allege the specific reason which induced the voters to assent to it. In fact, a plea could not be thus framed, unless the voters expressed the cause which operated upon them, without a special inquiry of each, which they might or might not

answer at pleasure. Besides, they might have been influenced by various reasons, to state all which would require a plea of most inconvenient length. But apart from these considerations, it may be asked for whose benefit is it, that the plea should be thus special? The propriety of the decision of the voters could not be revised by a jury; the more especially where it has not been drawn in question by the party who seeks to set it aside.—If it were possible to show that they were influenced by improper or insufficient motives, the facts should be specially alleged in a replication; it is not necessary for the plea to state the inference which the law makes in favor of the act done, by an allegation more full than it contains in the present case.

In other respects, the plea is believed to be unobjectionable.—The judgment is consequently reversed, and the cause remanded.

Ex parte BANK OF THE STATE OF ALABAMA.

1. The term of the county court of Tuskaloosa county, held on the 2d Monday of December, 1843, was authorised by the act of the 13th February, 1843.
2. The judge of the county court of Tuskaloosa county, under the act of the 13th Feb. 1843, is authorised to tax a fee of two dollars on bank suits, although no jury trial is had.

B. F. Porter, for the Bank, moved for a *mandamus* to the judge of the county court of Tuskaloosa county, requiring him to issue a *supersedeas* in a certain case, where execution either had or was about to issue against the Bank on a judgment for costs in favor of M. E. Chiles, et al. In the petition, it is shown, this judgment was rendered at a term of the county court commenced on the 2d Monday of December, 1843. Another reason urged for the *supersedeas* is, that a fee of 2 dollars, as taxed in the bill of costs, is the judge's fee. More than 100 cases were said by him to be in the same condition; and he urged—

1st. That the term of the county court was not warranted by

law; and as to this point, cited the acts of 1843, p. 125, § 3; act of 1821, Clay's Dig. 298, § 13.

2d. That the fee taxed is not allowed by law. As to this, he cited, act of 1815, Clay's Digest, 575, § 94; act of 1821, Aikin's Digest, 189; act of 1831, Clay's Dig. p. 316, § 24; act of 13 February, 1843, p. 81; act of 14 February, 1843, p. 56.

GOLDTHWAITE, J.—1. The first question to which our attention is called by this motion for a *mandamus*, is, whether a term of the county court of Tuskaloosa county was lawfully held on the 2d Monday of December, 1843. Previous to the 13th February of that year, that court was required to hold its sessions twice in each year—on the 3d Mondays in January and July. On that day, an act was approved by the Governor containing a section in these words, "Be it enacted, &c., That the next term of the county court of Tuskaloosa county shall be holden, as heretofore, on the 3d Monday of July, 1843; and thereafter, the terms of said court shall be holden on the 2d Mondays in May and December in each year." The evident object of this enactment was to change the terms of that court from January and July to December and May, but it was not to take effect until after the July term for the year 1843. The construction contended for by this motion, would cause an interval of 10 months; for no court could be held until May, 1844, if that held in December was unauthorized. If the words December and May are transposed in the section, the meaning of the Legislature would be free from all doubt. Even as it is, we think it perfectly clear, that the act contemplated a term of the court should be held on the 2d Monday of December, 1843.

2. The other question would be equally clear, if it was not that it is embarrassed by connecting it with a former practice of the county court judges.

The question is whether the judge of the county court of Tuskaloosa county, is authorized to tax a fee of two dollars to himself for rendering a judgment of *non pros.*, or dismissal, in a suit by the Bank of the State of Alabama.

The act of the 13th February, 1843, ascertains what fees a judge of the county court shall thereafter be allowed, and among these, is one of two dollars for each judgment or decree. This act would seem to admit of no other construction than that the

fee was allowable in all cases were judgments are given, without regard to their character. But it is said this act must be controlled by another, which was approved on the 14th of the same month. This last, directs that the tax fee of two dollars on each judgment rendered in all cases of debt, due the several banks in this State, shall belong to the county treasury of the county where the defendant may reside. If we stop here, it is impossible to trace any connexion between these acts; for nothing, as yet disclosed, leads to any inference that the last was intended to control the first. When we go one step further back, we find, by the act of 1831, that the county tax was abolished on all suits in Tuskaloosa circuit or county courts, in favor of the Bank of the State of Alabama, in which judgments should be had without the intervention of a jury. [Clay's Digest, 316, § 24.] This county tax was imposed by the act of 1815 for the purpose of providing a fund *to defray county expenses*, and is one of two dollars on each suit instituted in the county. [Clay's Digest, 575, § 94.]

When the county court was re-organized in 1821, and directed to be held by one judge, no salary was given to him, but certain fees were provided to be paid for his compensation; among these, we find a direction that *the tax fee then allowed by law for a jury*, should be paid to the judge. [Act of 1821, § 26—Toulmin's Digest, 199.] It is said, this is the only authority which the judges had for taxing any fee for their services, until the act of the 13th February, 1843; and as this fee was abolished in 1831 in all bank suits in Tuskaloosa county, where the judgments were had without the intervention of a jury, it is insisted, that as to such suits, the act of the 13th February, 1843, does not give the judge of the county court of that county any right to tax his fee, although he and all the other judges are entitled to it in every other class of cases. If the county tax, created by the act of 1815, was transferred to the county judges by the act of 1821, we do not well see how their right was affected by the act of 1831, inasmuch as there was then no *county tax* on suits in the county court of Tuskaloosa county; but, conceding that the legitimate interpretation of the act of 1831, was to abolish the fee in certain courts, we cannot perceive that an exemption from 1831, until the passage of the act of 1843, deprived the Legislature of the power to give a fee, by way of compensation, to the county judges. The only plausible objection against the right to this fee,

is dirived from the title of the act and its general object, which is to reduce, and not increase, the fees of any of the officers named in it; it is to be borne in mind, however, that other fees of this officer were reduced, and, in place of the fees which, previously, they were allowed to charge, a new fee bill is given. We are not authorized to restrict the fees, which are plainly allowed by this act, to cases in which they were allowed similar fees previously, because we cannot know that those which are specifically given, were not intended in place of others, which are now cut off.

Our conclusion, on both questions, is against the motion, and it is denied.

GODFREY v. HAYS.

1. A father being obliged to support his children, is entitled to their services during minority, and to the product of their labor, so long as they remain members of his family, but if he drive them away, or voluntarily permit them to leave him, and provide for themselves, he is not entitled to their earnings.
2. Where a father made a contract with his son, *then living with him*, that he would give him a slave for doing certain work upon a mill, which was done, and the slave conveyed to the son—*held*, that the slave could be taken in execution at the suit of the creditors of the father.

ERROR to the Circuit Court of Sumter.

Detinue by the defendant in error, against the plaintiff in error, for a slave.

From a bill of exceptions, taken at the trial, it appears that the defendant produced, and proved, a bill of sale, for the slave, from his father to him. That the son, being a minor, living with his father, by contract with the latter, assisted in repairing a mill, the property of the father, which was the consideration for the conveyance of the slave; and proved that the labor was equal to the value of the slave. Both the son and the slave remained with

the father, after the conveyance. At the time of the conveyance, the father was possessed of considerable property, and in good credit, though considerably indebted at the time; and that, subsequently, all his property had been sold, without satisfying his debt; the slave, so conveyed to the son, being sold under execu tions against the father.

Upon these facts, the counsel for the defendant moved the court to charge the jury, that if they believed that the father was indebted before and at the time of the contract with his infant son, and that the negro in controversy was sold under execution on account of a pre-existing debt, that then the plaintiff ought not to recover. And, further, that when a parent is indebted, and his minor son, who is living with him, does work for the parent under contract with him, and the parent, in consideration thereof, transfers a slave or other property to the minor, such transfer is void against pre-existing creditors.

These charges the court declined giving; and charged the jury —1st. That if they believed the contract was entered into to delay, hinder or defraud creditors, it was void. 2d. That though the son was a minor, and living with his father, yet if the work, which was the consideration of the transfer, was done pursuant to a previous contract, it was valid, even against pre-existing creditors; but, if the work was performed without any previous contract, and the father, after it was done, had conveyed the slave in satisfaction thereof to the son, the transfer would be void against pre-existing creditors. To all which, the defendant excepted; and judgment being rendered for the plaintiff, the defendant prosecutes this writ, and assigns for error the matters of law arising on the bill of exceptions.

Boyd, for plaintiff in error, cited 3 Porter, 196; 3 Johns. Ch. R 481; 15 Mass. 274; 2 Wendell, 461.

Smith, *contra*, cited 12 Mass. 375; 15 id. 272; 2 id. 113; 10 id. 287; 1 id. 525; 3 Pick. 201; 7 Cow. 92; 5 Wend. 204; 5 Johns. Rep. 324.

ORMOND, J.—From the obligation of the father to support his children during minority, he is entitled to their services, and to the earnings of their labor. The right and the duty are recip-

rocal; for it cannot be doubted, that if the father should refuse to support his child, and drive him from the parental roof, that he could not claim his earnings. [Nightingale v. Withington, 15 Mass. 272.] The law would be the same if the father should permit the child to labor for his own benefit; but in such a case, the child must cease to be a member of the family; the relative obligations of parent and child must cease—in the language of the case just cited, the child must be "emancipated."

In such a case, no doubt, the father might employ his child, and compensate him for his labor, and the product of his earnings would be beyond the reach of the creditors of the father, as they have no claim, legal or moral, on the labor of his child; but when the child is a part of the family, the product of his labor belongs to the father; and is, therefore, subject to the payment of his debts.

These principles are decisive of this case. Here, the son remained under the parental roof, and the family relation of father and child was not severed. The obligation of the father for maintenance, therefore, continued; and, as a consequence, he was entitled to the earnings of the son.

If it were conceded that this contract could be enforced by the son against the father, it would avail nothing in this case. The father being entitled to his earnings, the conveyance of the slave on account of the labor of the child, was without consideration, and void as against creditors. Let the judgment be reversed, and the cause remanded.

BISSELL & CARVILLE v. CARVILLE & CO.

1. The judgment entry recited the appearance of the defendants, by J. P. S., who confessed a judgment for them under a power of attorney, which was filed with the papers in the cause: *Held*, 1. That the defendants having appeared by attorney, could not object to the want or irregularity of the service of process. 2. That the mere production of the power of attorney did not make it part of the record, but that the recital of its contents was sufficient to support the

judgment. 3. That it was not a conclusion of law, that the power of attorney was not the act of both the defendants, because it was executed in the firm name. 4. That although the judgment would have been more technical if it had affirmed the power of attorney was duly proved, yet it might be intended that its execution was satisfactorily shown.

WRIT of error to the Circuit Court of Dallas.

This was an action of assumpsit at the suit of the defendants in error, against the plaintiffs, for the recovery of the sum of three hundred and eighty-seven dollars and ninety-three cents. The writ having been executed by an acknowledgment of service, the following judgment was rendered: "This day came plaintiffs, by their attorneys, and the defendants, by Joseph P. Snffold, to whom a power of attorney was executed, to confess a judgment in this case—which power of attorney is filed with the papers in the cause, confesses a judgment in favor of the plaintiffs, for the sum of three hundred and eighty-seven dollars and ninety-three cents. It is, therefore, considered by the court, that the plaintiffs recover of and against the defendants, the said sum of three hundred and eighty-seven dollars and ninety-three cents, so confessed as aforesaid, and the costs in this behalf expended, &c. A power of attorney is found in the transcript, purporting to have been made by the defendants below, corresponding with that described in the judgment, subscribed in their firm name, with a seal set opposite.

EVANS, for the plaintiffs in error.
G. W. GAYLE and J. P. SAFFOLD, for the defendants.

COLLIER, C. J.—1. It is insisted, that as the defendants below were not served with process by the sheriff, but the only evidence of the service is, the appearance of their names subscribed thus, "Bissell & Carville," to an acknowledgment, it should have been shewn to the circuit court that the acknowledgment was genuine, and made by the authority of both; more especially as it appeared from the writ, that the partnership was at an end. It is clear that one partner cannot, after a dissolution of the partnership, accept the service of process in the name of the firm; and it is equally well settled, that where process has not been executed otherwise than by written acknowledgment in the name of the

defendant, its genuineness must be shewn by proof to authorize a judgment by default. But in the present case, the defendants appeared, and this was sufficient to cure, either the want of, or defective execution of the writ.

2. In Hodges & Puckett v. Ashurst & Son, [2 Ala. Rep. 301,] we held that the mere production of a power of attorney, and the confession of a judgment under its authority, did not make it a part of the record, and an appellate court could not regard it as such, though it was certified with the transcript. But if we were allowed to look into the letter of attorney in the present case, the judgment would not be affected by it; for it is in all respects, such as the judgment recites. So in the case cited, it was decided that it was indispensable to the regularity of a judgment confessed under a power from the defendant, that the authority should be set out *in extenso* upon the record, though it would always be proper to do so.

The execution of the letter of attorney, in the firm name, is no objection to the authority which it confers; for, from any thing appearing to the contrary, both the defendants may have been present, and if both did not actually execute it, yet they may have adopted it as their joint act.

The judgment would have been more technical, if it had specially recited the fact, that the execution of the power of attorney, was proved to the court; yet we think it clearly inferrable from the entry, that the court had sufficient proof to satisfy the mind upon this point. It is certainly the duty of this court, to sustain by all reasonable intendments, the acts of inferior tribunals, and this principle should not be disregarded in the case before us. It results from what has been said, that the judgment of the circuit court is affirmed.

MOORE v. SPENCE.

1. A gift of slaves by a father to a son is void as against existing creditors.
2. The right of a creditor in such a case, is not varied by the fact that a new note was executed for the debt subsequent to the gift.

ERROR to the Circuit Court of Talladega.

Trespass, *vi et armis*, by the plaintiff against the defendant in error, as sheriff of Talladega. The defendant pleaded the general issue, and a special plea setting up a justification, that the property was seized by virtue of legal process. Issue on the demurrer to the second, which was overruled by the court.

On the trial, the plaintiff proved, that in the summer of 1837, William H. Moore, his father, informed him that his wife's mother had died in Virginia, and had given to the wife some ten or twelve negroes, and that he, plaintiff, might have them if he would go or send for them. He accordingly sent an agent, who received them in Virginia for plaintiff, in December, 1837, and brought them to Talladega, where they remained for about a year, on the plantation of W. H. Moore, in the possession of the agent, then overseer of W. H. Moore, until they could be sent to Mississippi, where plaintiff was then living. The plaintiff carried the slaves to Mississippi in February, 1839.

The defendant produced in evidence an execution against W. H. Moore, in favor of J. R. B. Eldridge, and that, as sheriff of Talladega, he levied it on the negro in the controversy, which was one of those above mentioned, on the 2d August, 1842, by virtue of which he sold the slave. Defendant also offered W. H. Moore, who testified that when he gave the slave in controversy to his son, he owed the plaintiff in execution, J. R. B. Eldridge, a debt, secured by three notes under seal, which were due in 1833 or 1834. That on the 1st September, 1841, these notes were delivered up and destroyed, and a due bill executed in lieu thereof, for $478 50, which is the foundation of the judgment on which the execution, on which the levy was made, issued. Witness stated, that he never had possession of the slaves. That at

the time of the gift, he owed ten thousand dollars or more, but had ample means left to pay his debts. That the slaves were a reasonable provision for his son, and intended as such, and not equal in value to the provision made for his older children.

The court charged, that if William H. Moore owed the plaintiff in execution the debt, which was the foundation of the suit, at the time he made the gift to his son, that the gift, as to Eldridge, was fraudulent and void.

2. That the execution of the due bill, and delivery of the three notes to W. H. Moore, did not extinguish the original debt, or affect the right of Eldridge to have his debt paid out of this property.

The defendant's counsel moved the court to charge the jury, that if William H. Moore never had the possession of the slave, it could not lawfully be taken in execution for his debts. To which the court replied, that if the slaves were given to the wife of William H. Moore, unless it was a gift to her sole and separate use, it was in law a gift to the husband; and that such gift, and the additional fact that he had assumed to give it to his son, who had taken possession of it, was a taking possession by the father.

To all which the defendant excepted; and which he now assigns as error.

Rice, for plaintiff in error, insisted, that the decision in Miller v. Thompson, (3 Porter, 196,) went too far—that the question of fraud should be left to the jury. In proof of which, he cited 4 Cow. 599; 8 id. 406; 4 Wend. 303; 7 id. 437; 15 id. 588; 18 id. 375; 1 Stew. 67; 11 Wheaton, 213; 1 Story's Eq. 344, 364.

As to the extinguishment, he referred to 2 Stewart, 498; 2 Porter, 280, 401; 1 Ala. 565; 5 Yerger, 199.

On the point of possession, to 1 Story's Eq. 300.

L. E. Parsons, *contra*, relied on the statute, Clay's Dig. 254; 3 Porter, 196; 3 Johns. C. 481; 5 Cowen, 72.

ORMOND, J.—The principal question is, whether a gift of slaves by a father to his son is void as against existing creditors.

In the case of Miller v. Thompson, [3 Porter, 196,] this question was considered by this court, and an elaborate opinion delivered, holding the affirmative of this proposition. No subse-

quent opinion of this court has weakened the force of that adjudication, and we, therefore, decline entering into a discussion of the merits of the question. Even if we were dissatisfied with the decision, which we do not wish to intimate, we should hesitate long before we would overturn one so elaborately considered—of so much importance to the community to be settled on stable principles, and so long acquiesced in.

Another question, which has been argued in the case, is, whether the original debt of the father to Eldridge, which existed anterior to the gift of the slaves to the son, was not extinguished or merged in the note or due bill executed subsequent to that event, upon the consolidation of the three notes. It cannot admit of question, that the debt which existed previous to the gift of the slaves, was not, as it respects this question, affected in the slightest degree by the consolidation of the three notes into one due bill, subsequent to the gift. The rights of Eldridge did not arise from the fact, that the debt was secured by notes, but because the debt was due. Any change, therefore, of the evidence of the existence of the debt, made by consent of the parties, can exert no influence on the rights of either.

It was further insisted, that the father never had possession of the slaves, and never asserted any right under the will of his wife's mother; and that, therefore, no right ever attached, upon the slaves in question, in favor of Eldridge.

It appears that the slaves, being in Virginia, were bequeathed to the wife of Wm. H. Moore, the father, by her mother, and that the father gave them to the son, on condition that he would send for them. It is an established principle, that the right to personal property draws to it the possession; but independent of this consideration, the gift to the son was an exercise of ownership over the property by the father, and the reception of it by the son, is an admission of the title of the father. This point, however, is too clear for argument.

Let the judgment be affirmed.

STALLINGS v. WILLIAMS' Adm'r.

1. A declaration, at the suit of an administrator, upon a promissory note payable to his intestate, should allege that payment was not made either to the deceased in his life-time, or the plaintiff since his death; and if it merely negatives a payment to the plaintiff, it is bad *on demurrer*.
2. The plea of *ne unques executor*, is a plea to the merits, within the meaning of the act of 1824, which authorises a defendant, whose demurrer is overruled, to withdraw the same and plead to the merits of the action.

Writ of error to the County Court of Sumter.

This was an action of assumpsit at the suit of the defendants in error, against the plaintiff. The declaration commences in the usual form, and describes the plaintiffs as the administrator and administratrix of Thomas Williams, deceased; it then sets out a note dated on the 22d of January, 1836, by which the defendant promised to pay to Thomas Williams or bearer, the sum of sixteen hundred and one dollars and twenty-three cents, three years after date, with interest thereon. It concludes by averring that the defendant has not paid to the plaintiffs the money in the note expressed, to their damage, &c.

The defendant demurred to the declaration, and his demurrer being overruled, he obtained leave to plead over, and thereupon tendered a plea denying that the plaintiffs were administrator and administratrix of Thomas Williams. deceased, but the court rejected it, on the ground that it was not a plea to the merits of the action. Thereupon the defendant declined to plead further, and a judgment by default was rendered against him.

Green, for the plaintiff in error.
Smith, for the defendants.

COLLIER, C. J.—It is insisted that the demurrer to the declaration should have been sustained, because the breach of the defendant's promise is not well assigned. Where an action is brought by an executor or administrator upon a contract with his testator or intestate, it is not enough to alledge that the defendant

did not pay to the plaintiff, but it should be stated that payment was not made, either to the deceased in his lifetime, or the plaintiff, since his death. [Chitty on Plead. 3 Am. ed. 328; 1 Saund. on Plead. & Ev. 134.] A breach otherwise assigned would be too narrow, and not in terms co-extensive with the contract.—The assignment in the present case, might perhaps be aided by verdict under the usual common law intendments, that the judge would have directed the jury to require, and the jury did require sufficient evidence; but upon demurrer, it is clearly fatal. [1 Saund. Rep. n. 1; Thomas v. Roosa, 7 Johns. Rep. 461; Lunn v. Payne, 6 Taunt. Rep. 140; Siclemore v. Thistleton, 6 M. & S. Rep. 9; Perreau v. Bevan, 5 B. & C. 284; Charnley v. Winstanley, 5 East's Rep. 270.]

2. The act of 1824 enacts, that where a demurrer is overruled, the court shall grant leave to the party demurring, to withdraw the same, and plead to the merits of the action, &c. [Clay's Dig. 344, § 119.] In the present case, the court upon overruling the defendants demurrer to the declaration, gave him leave to plead over, but rejected the plea of *ne unques executor*, on the ground that it was not a plea to the merits. The question to be now considered is, whether that plea is such as in the meaning of the statute, goes to the merits of the action.

The plea of *ne unques executor* is a plea in bar, because it does not propose to give to the plaintiff a better writ, but denies his right to sue at all in the representative character he has assumed. [1 Saund. Rep 274, n. 3.] It impliedly admits the cause of action where it is pleaded alone, [2 Saund. on Plead. and Ev. 511;] and it is said that the defendant cannot avail himself of the matter of the plea under the general issue. [1 Chitty on Plead. 3, Am. ed. 485.] The plea certainly sets up a meritorious defence; while it admits the cause of action to be just, it denies that the plaintiff is entitled to maintain a suit upon it. It is incumbent upon the plaintiff, under a proper state of pleading, not only to sustain by proof the defendant's liability to some one, but he must show that he is the person legally entitled to recover. A failure of the evidence upon either point, would be alike fatal to the plaintiff, and equally affect the merits of the action.

An issuable plea, and a plea to the merits, are frequently used as equivalent expressions. By pleading issuably, it is said, is meant not only a general issue, but any other plea upon which

the plaintiff may take issue and go to trial upon the merits. [1 Burr. Rep. 605; 2 id. 782; 5 T. Rep 152.] A plea of tender and of the statute of limitations are issuable pleas. [1 H. Black. Rep. 369; 1 Burr. Rep. 59; 1 Bos. & Pul. Rep. 228; 3 T. Rep. 124.] But what we have already said may suffice to show that the plea which was rejected by the county court, went to the merits of the action, and was improperly ruled out. Upon both the grounds taken by the plaintiff in error, the judgment of that court is reversed, and the cause remanded.

THE STATE, EX RELATIONE v. BOWEN.

1. A mandamus will not lie to compel a judge of the county court to accept a bond tendered by the sheriff; he having adjudged it insufficient, and for that cause, having declared the office vacant.

ORMOND, J.—This was an application to the circuit court of Randolph county, for a *mandamus* to the judge of the county court of that county, commanding him to accept a bond tendered by the sheriff.

The judge of the county court, it appears, had declared the office of the sheriff vacant, in a proceeding at the instance of one of the sureties of the sheriff, to compel the sheriff to execute a new bond. The proceeding resulted in a judgment of the county court, declaring the office of sheriff vacated. This was a final judgment by a court of record in a matter over which it had exclusive jurisdiction, and whilst the judgment remained unreversed, was conclusive of all the matters thereby adjudicated. The sufficiency of the sheriff's bond was a matter in issue, and adjudicated in that proceeding, and the circuit judge acted correctly, therefore, in refusing a *mandamus*.

Let the judgment be affirmed.

LUNSFORD, USE, &C. V. BASKINS' ADM'X.

1. The bond required to be executed upon the prosecution of an appeal from a judgment rendered by a justice of the peace, is, only a means provided by statute for the continuance of the litigation in the appellate court, and does not impose upon the sureties an obligation other and greater than that to which the appellant is liable: consequently, where one sued as administratrix, appeals, she may plead that the estate she sepresents has been declared and adjudged insolvent, and if her plea is sustained, no judgment can be rendered against her sureties on the appeal bond.
2. The defendant, an administratrix, pleaded, that the estate of her intestate was declared and adjudged insolvent, the jury found the plea to be true, assessed the plaintiff's damages, and judgment was rendered that the suit abate and be referred to the orphans' court: *Held*, that although the act of 1843 required, that the judgment in such case should be that the plaintiff is entitled to the sum found due him, but no execution shall issue and the judgment be certified the proper orphans' court, yet the defect was a mere clerical misprision, amendable at the costs of the plaintiff in error.

WRIT of error to the county court of Montgomery.

This cause was originally eight suits, commenced before a justice of the peace of Montgomery, on eight promissory notes, made by the defendant's intestate, and payable to the plaintiff—all of which, it is declared by the plaintiff's affidavit, were lost or mislaid. Judgment was rendered in each suit in favor of the plaintiff, and each case removed by appeal. on the execution of the usual bond, with sureties to the county court. On motion of the defendant, all the cases were consolidated by the county court, and a declaration filed by the plaintiff on all the notes.

The defendant pleaded, 1. That her intestate in his lifetime, "did not make, execute or sign the said several promissory notes in the said plaintiff's declaration mentioned, nor either of them," nor did he authorise any person to make, execute or sign them, or either of them for him. This plea was verified by an affidavit of the defendant which declared that the facts set forth therein, "are true to the best of her knowledge and belief." 2. *Non assumpsit.* 3. Payment. 4. Set off. 5. Accord and satisfaction. The plaintiff demurred to the first plea, and took issue on the others, and

his demurrer being overruled, issue was also joined on the first plea. At a subsequent term, the defendant pleaded *puis darrien continuance*, that the estate of her intestate had been reported insolvent, to the orphans' court of Montgomery, and so adjudged by that court; that the decree remained in full force, unrevoked, &c, The plaintiff, after craving oyer of the proceedings before the justice of the peace, appeal bonds, &c. demurred to this plea, and his demurrer being overruled, he replied, an issue was made up, and the cause thereupon submitted to a jury, who affirmed by their verdict, the truth of the plea, and assessed the plaintiff's damages at four hundred and forty-one dollars and sixty cents. A judgment was rendered on the verdict as follows: "It is therefore, considered by the court, that this suit abate, and be referred to the orphans' court of the county of Montgomery."

J. P. Saffold and Fair, for the plaintiffs in error—insisted that the county court should have rendered a judgment against the defendant and her sureties in the appeal bonds, to be levied *de bonis propriis*. [Barry v. Rush, 1 T. Rep. 692; Worthington v. Barlow, 7 id. 453; Willes' Rep. 317, n. a.; Wms. on Ex. 1097–8; Bettis v. Taylor, 8 Porter's Rep. 574; 3 Marsh. Rep. 387; 1 Johns. Cases, 276; 10 Johns. Rep. 367; Morrison v. Morrison, 3 Stew't Rep. 444; Clay's Dig. 315, § 11; 1 Chitty's Plead. 650; 1 T. Rep. 758; 4 Taunt. Rep. 821; 6 Cow. Rep. 225; 12 Wend. Rep. 475.]

The judgment should have been against some or all the obligors in the appeal bonds. [1 T. Rep. 691; 1 Johns. Cases, 276; Clay's Dig. 195, § 13.]

N. Harris, for the defendant. The statute makes the execution of an appeal bond, a condition precedent to the prosecution of an appeal from the judgment of a justice of the peace. It is the means by which the party supposing himself aggrieved by such a judgment, can have a trial in a higher court, and sureties may avail themselves of any defence which their principal can.—The character of the parties is not changed by the bond which is given, and if an administrator appeals and executes a bond which would authorise a judgment against him in his individual capacity, the suit, notwithstanding, continues against him in his representative character.

The decree adjudging an estate insolvent, is an answer to an action against its administrator, and will avail his sureties in an appeal bond. In the present case, the judgment does not strictly conform to the last statute upon the subject; the variance it is believed, is not so material as to authorise its reversal. He cited Clay's Dig. 195, § 13; id. 314, § 9; 315, § 11; Aik. Dig. 152; Quit, et al. v. Adair, 4 Ala. Rep. 315.]

COLLIER, C. J.—The act of 1814, in connection with that of 1822, enacts that any person aggrieved by the judgment of a justice of the peace, may, within five days after its rendition, appeal to the circuit court, or county court of the county, giving bond with good security in double the amount of the judgment, conditioned to prosecute his appeal to effect; and in case he be cast therein to pay and satisfy the condemnation of the court.—[Clay's Dig. 314, § 9.] By a statute passed in 1816, it is provided, that whenever any judgment rendered by a justice of the peace, shall be removed into any court by appeal, *certiorari*, or otherwise, if it be affirmed, a judgment shall be entered against the security as well as the principal, and execution may issue against both or either of them. [Id. 315, § 11.]

The appeal is not the institution of a new suit, but the mere continuance of one already commenced, by its transfer to another tribunal of superior jurisdiction. In the appellate court, the parties occupy the same position in respect to each other, that they did in the inferior court, and the cause is there to be tried *de novo*. [Clay's Dig. 314, § 10.] The execution of a bond, as the condition upon which the cause is to be removed, is a means provided, by which the litigation is to be continued, and can have no influence upon the pleadings, nature of the defence, or proof which may be adduced. If the plaintiff is the appellant, his situation on the trial will not be in any manner prejudiced thereby; nor will the defendant, if such is his relation to the suit, be prevented from urging any matter of defence which the law recognizes as sufficient to prevent a recovery, if the case had been originally brought in the appellate court. The failure of the appellant to prosecute his appeal with effect, so as to recover a judgment against the appellee, will not be sufficient to make his sureties liable to a judgment; but he must in the language of the statute, "be cast" in the

suit, in order that his sureties may be bound "to pay and satisfy the condemnation of the court."

The act of 1843, "to amend the laws now in force, in relation to insolvent estates," [Clay's Dig. 195, § 13,] enacts that, "no suit now pending, or which may hereafter be brought or revived against any executor or administrator, shall be abated on any plea or suggestion, that such estate has been reported or declared insolvent, since the commencement of such suit; but after such estate shall have been declared insolvent in the manner herein provided, that fact may be specially pleaded by the executor or administrator, without thereby waiving or abandoning any plea by him previously pleaded; and the suit shall be tried on all the issues that may be joined in the case; and if the issues joined on all the other pleas except the special plea of insolvency be found for the plaintiff, and the issue joined on that special plea shall be found for the defendants, the court shall render judgment, that the plaintiff is entitled to the sum of money found due him, but that it appears the estate has been duly declared insolvent, no execution shall be issued therefor, and that the judgment shall be certified to the proper orphans' court; and upon a duly certified transcript of such judgment being filed as a claim against the estate, as herein provided, the plaintiff shall be allowed as a creditor of the estate, his rateable portion on the amount of such judgment; and the costs of such suit." This statute, as its title indicates, is amendatory of pre-existing laws, one provision of which was to abate any action pending against an executor or administrator, upon its being reported to, and declared by the orphans' court, that the estate he represented was insolvent; and thus leave the plaintiff without reference to the justice of the demand to pay his own costs. The effect of the act is to permit the defendant, together with the plea of insolvency to interpose a denial of the cause of action, but if the latter defence is found untrue, if the former is sustained, the plaintiff is not entitled to a judgment against the defendant, but the judgment is, that he is entitled to the sum found to be due him, and he is referred to the orphans' court for its payment.

If the principal is not liable, it would be somewhat of an anomaly to say that the surety is. The latter undertakes for the performance of a duty by the former—his undertaking may be said to be incidental or accessorial, and in order to charge him, it should appear that his principal is bound. The surety cannot, in

a case like the present, be liable otherwise, and to a greater extent than his principal. This conclusion seems to us to result from the principles of the common law, as well as from a reasonable and just construction of our own statutes. And its justness is obvious, when we recollect that the appeal is a mere continuance of the litigation, no matter by which party prosecuted; and that the appeal bond is a means by which the cause is to be removed, intended to secure the payment of such judgment as may be recovered against the appellant; but never to impose upon the sureties a liability beyond this.

It is true, the judgment in this case does not in terms conform to the statute, though the discrepancy, it is believed, is not such as in any manner to affect the plaintiff's rights. Be this as it may, the defect is at most, a mere clerical misprision, amendable here at the costs of the plaintiffs—an amendment will be accordingly made, and as the view taken shows that there is no available error, the judgment of the county court is, in other respects, affirmed.

WELCH, ET ALS. v. FOURIER.

1. A notice against a defaulting sheriff or constable, is sufficient, if it specifies the term at which the motion is made.
2. When sureties unite with their principal in a plea to the merits, it is an admission of the fact of suretyship.
3. A finding by the jury for the plaintiff, on an issue to the merits, includes all the facts necessary to the ascertainment of the defendant's liability, unless a statute requires the facts to be specially found.

ERROR to the County Court of Sumter.

This was a motion by the defendant in error, against the plaintiff, as constable, and others, his sureties, for failing to pay over, on demand, the amount of an execution collected by him.

At the trial of the motion, the sheriff and his sureties appeared

and objected to the sufficiency of the notice, because it did not specify the day of the term when the motion would be made; but the court overruled the objection, and refused to quash the notice.

The defendants then pleaded to the merits.

On the trial, the defendants moved the court to charge the jury, that before they could find the said Welch liable, as constable, and the other defendants as his sureties, that they must be satisfied, by the production of his official bond, that he was constable, and they were his sureties. The court refused so to charge; and instructed the jury, that that inquiry could only be necessary upon the plea of *non est factum* to the official bond. To all which the defendants excepted.

The jury found the issue for the plaintiff, and assessed his damage to $72 09. The court rendered a judgment for that sum, being the principal and interest at ten per centum per month, to bear interest at five per cent. per month until paid, besides costs, &c.

The assignments of error are—

1. The refusal to quash the notice.
2. The refusal to charge, and the charge given.
3. The jury should have found affirmatively that the constable refused to pay on demand.

Green, for plaintiffs in error.

Boyd, *contra.*

ORMOND, J.—In McRae v. Colclough, [2 Ala. 74,] it was held, that notice of the intended motion against a defaulting sheriff, was sufficient, if it specified the term of the court, without designating the day of the term of the court at which the motion would be made. The two statutes are alike, both requiring three days' notice to be given of the time and place of making the motion. That decision must, therefore, govern this case.

Where sureties, as in this case, appear and unite with their principal in the defence, a plea to the merits will be an admission of the fact of suretyship, and supersede the necessity of proving it. Such proof would only become necessary on the plea of *non est factum.* See Reid v. The P. & M. Bank of Mobile, [3 Ala. Rep. 712,] where the point was thus ruled. The same principle

applies to the constable who, by pleading to the merits, admitted the character in which he was sued.

It was not necessary that the jury should have found expressly that a demand was made of the constable for the money. The penalty which has been recovered in this case, depends, it is true, on that fact; but the statute does not require that the fact should be expressly found by the jury, if one is empannelled. In the absence of any such requisition, the finding of the jury for the plaintiff, on the issue, is conclusive that those facts were proved, upon which alone their verdict could be founded.

There is no error in the judgment, and it must, therefore, be affirmed.

LANGDON, ET AL. v. ROANE'S ADM'R.

1. Where the parties have settled their accounts and struck a balance, which has been adjusted by cash, or with a security for its payment at a future day, it is incumbent upon the party complaining of fraud or mistake, by suit in chancery, to allege it specially in his bill, and to establish the allegation by proof; and the agreement by the parties that errors should be corrected, does not relieve the complainant from the *onus* of proving a mistake.
2. If a party to whom an account is rendered, admits its correctness, it becomes a *stated account;* or if he retains it and makes no objection within a reasonable time, his silence will be construed into an acquiescence in its justness, and he will be bound by it, as if it was a *stated account.*
3. *Semble:* That the enforcement of a contract may be prevented, by showing a fraud on the part of him who seeks to derive a benefit from it, unless the fraud has been assented to, or acquiesced in; but a party cannot as the actor in a suit in equity, avoid a security which he has given for a debt clearly due, becuuse he was induced to give it by the false representations of the creditor, made in ignorance of the facts, rather than from a settled purpose to deceive.
4. The complainant is not entitled to relief upon proof, to the admission of which there is no allegation adapted.
5. *Semble:* Where the complainant could obtain the relief to which he is entitled, without a resort to equity, the defendant will not be taxed with costs.

WRIT of error to the Court of Chancery, sitting for Greene county.

The intestate of the defendant in error exhibited his bill against the plaintiffs on the 8th January, 1839, in which it is alleged, that Messrs. Lea & Langdon, two of the defendants, were commission merchants for the complainant from August, 1835, to the spring of 1838—bought his supplies in Mobile, advanced money for him, and sold his cotton there. On the 10th November, 1836, L. & L. presented their account to the complainant, which amounted, after an allowance of all credits, to the sum of three thousand two hundred and sixty-eight 79-100 dollars; confiding in their integrity, he gave his note for that sum, at sixty days after date, negotiable at the Branch of the Bank of the State of Alabama at Mobile. Upon a more particular examination of the account, the complainant has discovered several errors, viz: a charge of $124 77-100 for bacon purchased for him on the 20th June, 1836, with interest and commissions thereon. This item, L. & L. have since admitted to be incorrect. There is a further mistake of three or four dollars, for compound interest charged.

The complainant states, that he sent to Messrs. Lea & Langdon his crop of cotton for 1836, making thirty-nine bales, averaging four hundred and fifty pounds each, although they have only furnished him an account of sales for twenty-four bales. The nett proceeds of twenty, sold in Mobile, amonnted to $1238 67-100; and the proceeds of four sold in Liverpool, were $261 46-100. L. & L. admitted they had sold five bales of Cotton in Liverpool, but no account has been rendered, excepted as above stated; if the other fifteen sold as well as those accounted for, then L. & L. have been fully paid off. The note, given on the 10th November, 1836, has been taken up by the complainant, and he has it in his possession ready to produce to the court.

On the 28th October, 1837, Martin A. Lea, of the firm of Lea & Langdon, called on the complainant for a settlement. He presented no regular account, but *memoranda*, made on detached pieces of paper; said that his firm had paid a note for $1920, which the complainant gave to David Harding, as also other liabilities, and thereupon demanded security for their re-payment. Confiding in the integrity of Lea, and that all errors would be corrected, the complainant gave his note $3298 97-100, dated the 28th of October, 1837, payable on the first of January thereafter; with interest from the date. At the same time, he executed a deed of trust with the view of securing the payment of the note,

by which he conveyed to Wm. Chambers six negroes, (whose names are particularly stated.) These negroes were to remain in the possession of the complainant until a sale was necessary, unless he should attempt to remove them without the county of Marengo. The trustee was invested with power to sell on the request of L. & L. upon advertising time and place, &c.

In February, 1838, Messrs. Lea & Langdon handed to the complainant a very imperfect account of his dealings with them, which is unsatisfactory and erroneous; occasionally charging the complainant with a sum of money, which is unexplained by any specification—embracing a period from the 20th April, 1837, to 13th Februury, 1838. L. & L. have not furnished an account current for the time intervening the 10th November, 1836, and the 20th of April, 1837, although the thirty-nine bales of cotton were shipped to them during that period.

It is further stated, that the consideration of the last note, which complainant gave to Lea & Langdon, is wholly unfounded, and was obtained by fraud; that they claimed of him the following sums for cash paid for his account and benefit, viz: $570 60-100, amount of draft paid J. G. Harvey; $737, amount of draft paid Webb & Dugger; $1920, amount of a note given by the complainant to David Harding. Whereas, it is charged that these drafts and notes have never been paid by L. & L., but are demanded of the complainant, and suits have been brought against him for their recovery; and on the two former, judgments have been recovered. These several items amount to a sum sufficient to extinguish the note of the complainant. Besides, the complainant sent L. & L. his crop of cotton in 1837, making 17 bales, which, by account of sales rendered the 24th January, 1838, yielded the nett sum of seven hundred and twenty-one 75-100 dollars.

The complainant alleges, that the trustee in the deed, on the 31st December, 1838, against his consent, and in despite of his remonstrances, removed the slaves, therein mentioned, from his possession, and imprisoned them in the jail of Perry county—saying he was instructed to do thus, &c.

The bill prays, that a subpoena may issue to Lea & Langdon and Chambers; that an account may be taken between the two former and the complainant, and if nothing be found due Lea & Langdon, then the collection of the note, either by suit or sale under the deed of trust, be injoined; or if part only be due,

then the residue of the note be injoined. And if the note and deed of trust made to secure its payment, be found to have been obtained by fraud, then the same may be delivered up to be cancelled, &c. In the meantime, that the trustee be injoined from selling the slaves until the further order of the court; and that such other relief as may be proper, be granted, &c.

An injunction was awarded to restrain the trustee from selling, &c., and requiring the complainant to give bond with surety, conditioned for the forthcoming of the property; which latter requisition was complied with, and the injunction issued.

The defendants, Lea & Langdon, filed a joint answer, in which they admit that the complainant and themselves made a settlement of their accounts on the 10th November, 1836, and that he gave them his note, as stated in the bill; they also admit the mistake of $124 77 for bacon, including commissions and interest; but this mistake, they affirm, was corrected with the assent of the complainant. They admit that complainant has possession of his note, that it was given up to him, and the amount carried to a new account; which new account they undertake to exhibit with their answer.

In the winter of 1836–'7, these defendants state, that they received of the complainant forty-one bales of cotton, four of which were sold in Liverpool for the sum stated by the complainant; an account of sales of the residue, and an appropriation of the proceeds, appear by the account above mentioned. All the cotton ever sent to the defendants are but seventy-three bales, the sales of which are shown by the accounts exhibited with their answer, which they aver is correct.

These defendants also admit, that the complainant gave them a note on the 28th October, 1837, as stated in his bill, but they deny that the payment of the note, made by the complainant and Walke, formed any part of its consideration. They never said that they had, or would pay this latter note. They admit the execution of the deed of trust, as alleged, and exhibit an account of the transactions between the complainant and themselves "from beginning to end." Admit that they have not paid drafts to Harvey, and Webb & Dugger, though they have charged commissions for accepting them. Taking the original in connection with the amended answer on this point, and there is a positive denial of the fact, that the complainant was charged with the amount of these drafts, or any part of either of them, as cash

paid for his use by these defendants. They admit the receipt and account of sales for complainant's crop of cotton grown in 1837, and aver that he was duly credited for the amount, as shown by the account exhibited.

They deny all fraud in obtaining the note and deed of trust; and aver that they were voluntarily given by the complainant. Admit removal of the slaves by the trustee to have been forcibly, yet they insist peaceably, made for the purpose of sale under the deed of trust. They believe that the slaves are not worth more than the amount of the debt they were intended to secure.

The defendant Chambers denies all fraud, or intention to oppress the complainant, affirms that he acted under instructions from his co-defendant Lea; that in removing and imprisoning the slaves his only object was to have them forthcoming on the day of sale.

Several witnesses were examined at the instance of the complainant. Billups Gayle, cashier of the Branch Bank at Mobile, testifies, that on the 19th of February, 1838, complainant's note for $2733 17-100 was discounted by that Bank, and the proceeds, $2707 21-100, went to the credit of Lea & Langdon. This note matured the 13 | 16th of April, and was paid, but by whom the books of the Bank do not show. On the 16th of April, 1838, complainant's note $2707 was discounted, and the proceeds, $2676 15-100, went to the credit of Lea & Langdon. This note matured on the 15 | 18 June, was paid, but by whom does not appear. On the third of May, 1838, the note of the complainant, with Wm. M. Burrell and John Burke as joint makers, was discounted for $1000, and the proceeds $954 33-100, went to the credit of Lea & Langdon. The proceeds of the notes were checked out at various times—the last note matured on the 3 | 6 of February, 1839, and was protested for non-payment; but was paid on the 20th of October, 1840, with one hundred dollars in cash, and a joint note of James Burke and Solomon Rhodes, payable on the fourth of April, 1841; which last note was unpaid in January, 1842, when the witness's deposition was taken. This witness testifies alone from what he finds on the books of the Bank—the entries in which were made before he came into office.

John M. Walke, also a witness for the complainant, testifies, that Lea, of the firm of Lea & Langdon, told him that the firm had paid a note in which the complainant was the principal, and

the witness a surety, for $1920, payable to David Harding; that they had paid it as commission merchants for the complainant, and charged him with it in his account current; and that the complainant, in 1838, executed a deed of trust on four or five negroes, to secure its payment. Complainant showed witness an account current of Lea & Langdon against him; in that, the note alluded to, was not charged.

David Harding, another witness for the complainant, proves, that he had the note of the complainant, in which J. M. Walke was a surety, for $1920; this note he indorsed to John Bloodgood, who sued him as indorsee. Langdon, of the firm of Lea & Langdon, told witness and Bloodgood, that Roane had deposited with the firm a sum sufficient to pay off the note with interest. No execution has ever issued against witness in the suit of Bloodgood, nor has he had any farther trouble about the matter. Langdon stated that he had paid over the money to Wm. Gordon, the counsel for Bloodgood in the suit against the witness.

Witness was present when a conversation took place between the camplainant and Lea, of the firm of Lea & Langdon, at Woodville, in respect to a settlement; Lea had no account with him, but referred to several sums of money which his house had advanced for the complainant, viz: the amount of the note made payable to this witness above referred to, and a draft to Harvey, and another to Webb & Dugger. Lea insisted they had paid them, and urged the complainant to settle by note; but the latter objected unless an account was rendered, and asked the advice of the witness, who told him that he should insist upon an account and the production of the liabilities that they might be cancelled. Lea seemed well satisfied, said complainant would do what was right, and invited him to take something to drink. Late in the evening, complainant and Lea called on witness in a state of intoxication; the latter remarked, that the former had settled with him, and had given his note for $3000 or upwards, and executed a deed of trust for its security on six negro men, to Wm. Chambers as trustee. The complainant then called on witness to take notice, that if, upon the exhibition of L. & L.'s account, he should owe them nothing, then the deed of trust should be void *in toto*, or if his indebtedness should be less than the note, then the deed should be void so far as it was not sustained by a consideration. To all this, Lea assented. Complainant, at the same time, in-

sisted, that the note made by Walke and himself was paid with money which he had furnished Lea & Langdon for that purpose. Lea said, if, upon examination, such should appear to be fact, the deed should be void to the amount of the note. Witness thinks deed of trust was made in the fall or spring of 1838; he was not present when it was executed, but saw complainant very soon after, and thought him too drunk to attend to business of so much importance.

When the settlement was first attempted, Lea said he had no account current with him, but insisted that his firm had advanced money for the complainant to different persons; which the latter denied, and called upon Lea to say to whom they had paid money for him. Lea mentioned the note of complainant and Walke, above referred to; this, the complainant insisted, had been paid with money placed by him in L. & L.'s hands; he then mentioned the drafts in favor of Harvey, and Webb & Dugger; these, the complainant contended, were paid with the proceeds of cotton which he had shipped them.

The chancellor was of opinion, that the note, made by the complainant in October, 1828, as well as the deed of trust, executed with the view of securing its payment, was obtained by fraud and misrepresentation; that they were consequently void, and could not be enforced for the purpose of collecting any balance that might be due to Messrs. Lea & Langdon. It was accordingly ordered and adjudged, that the same be delivered up to the complainant for cancellation; and that Lea & Langdon pay the costs of the suit.

W. M. Murphy, for the plaintiffs in error, insisted—

1. That the account of the transactions between the complainant and Lea & Langdon, exhibited with the answer of the latter, was to be considered as responsive to the allegation of the bill, which declared that no account current had ever been produced, and prayed that it might be furnished. [Paulling v. Sturgus, 3 Stewart's Rep. 95; McGowen v. Young, 2 Stewt. & P. Rep. 160.] This account shows an indebtedness for only $668—less than the amount of the note in question; and this, although the complainant is not charged for advances on account of the note to Harding or the drafts to Harvey, and Webb & Dugger.

2. Even admitting that Lea may have made a misrepresenta-

tion to the complainant at the time the note was given, yet if any thing is due Lea & Langdon, the deed must stand as a security *pro tanto*. [2 Story's Eq. 7–8; 11 Wheat. Rep. 103; 12 East's Rep. 637–8; 1 Story's Eq. 213, 498; 3 Ala. Rep. 448.] If Lea & Langdon were seeking to set up the deed in equity, that court might perhaps refuse its aid.

3. The complainant was a cotton planter, and had no other means of payment than his cotton crops—the account shows how the proceeds of every sale were disposed of. An account is only asked for from 10th November, '36, to 13th February, 1838; consequently, the answer of Lea & Langdon does not show what disposition was made of the money received from the Bank on the note of the complainant of the third of May, 1838. As to the money received from the Bank on complainant's notes, by Lea & Langdon, it must have been paid by them, as the former had no other means of payment than his cotton, which is all accounted for.

4. Harding's testimony alone, or in connection with the other witness, does not outweigh the answer.

F. S. Lyon, for the defendant, contended, that the only question which need be decided, was, whether the complainant was induced by fraud or misrepresentation to give the note of October, 1837, and the deed for its security. The proof, on this point, was ample and explicit to sustain the allegations of the bill. It is shown that the note was given in consequence of Lea's representation, that he had paid for the complainant the note given by him to Harding, and the drafts to Harvey, and Webb & Dugger. In fact, the answer of L. & L. does not negative the allegation, that the payment of these drafts formed part of the consideration for the note in question.

A *suggestio falsi* by Lea, is shown by the testimony of Walke and Harding; besides this, the manner in which the settlement was made, the discrepancy between the answer and the exhibit, are circumstances entitled to great weight. The answer of L. & L. affirms that the note is due *in toto*, while the exhibit shows that it was made for $668 53-100 too much; in addition, the proceeds of the note of $1000, received from the Bank, is not accounted for.

A *suggestio falsi*, or *suppressio veri*, whether proceeding from

a premeditated purpose to deceive, or no, vitiates the most solemn acts; and where one suggests a falsehood, without knowing it to be true or false, he is as much chargeable with a fraud, as if he knew what he asserted was untrue. [1 Story's Eq. 197, 201–2; 6 Ves. Rep. 173; 2 Wheat. Rep. 178; 2 Brown's Ch. Rep. 385–8; 1 Ves. & B. Rep. 355; 3 id. 111; 9 Ves. Rep. 21; 10 id. 475; 13 Peters' Rep. 26.]

COLLIER, C. J.—The frame of the bill does not require that the state of the accounts between the intestate and Messrs. Lea & Langdon, previous to the 10th November, 1836, should be examined; for although the account rendered by the latter, on that day, was not strictly correct, yet the error was admitted and corrected by the parties themselves. [Davis v. Spurling, 1 Russ. & My. Rep. 64.] We have only to inquire whether there was due to Lea & Langdon, on the 28th of October, 1837, the sum for which they received the intestate's note of that date? It cannot be intended that there was a mistake in the settlement; and, consequently, the *onus* of showing an error prejudicial to the intestate, rests upon the complainant. Where parties have settled their accounts, and struck a balance, which has been adjusted by cash, or with a security for its payment at a future day, it is incumbent upon the party complaining of fraud or mistake, to allege it specifically, and to establish the allegation by proof. The agreement of the parties, which is admitted by the answer of Lea & Langdon, and proved by the deposition of Harding, that all errors should be corrected, and the deed of trust stand as a security for so much as was really due the *cestuis que trust*, cannot render inapplicable the rule we have stated. That agreement was merely affirmative of what the law was, in the absence of any express understanding.

In Chappedelaine, and another, v. Dechenaux, [4 Cranch's Rep. 306,] the bill was filed to set aside a stated account, which was signed by the parties thereto upon a suggestion of fraud; or if it be not set aside, to correct its errors, and to obtain a settlement of transactions subsequent to that account. The account stated, was pleaded in bar of so much of the bill as required, that the subject should again be opened. The court said, that the plea must be sustained, except so far as it may be in the power of the complainants to show clearly, that errors have been com-

mitted, is a proposition about which no member of the court has doubted for an instant. "No practice could be more dangerous than that of opening accounts which the parties themselves have adjusted, on suggestion supported by doubtful or by only probable testimony." [To the same effect, see Blackledge v. Simpson, 1 Hayw. Rep. 259; Philips v. Belden, 2 Edw. Rep. 1; Bullock v. Boyd, et al. id. 293; Wilde v. Jenkins, 4 Paige's Rep. 481; Endo v. Caleham, 1 Younge's Rep. 306.]

It is said to be a general rule, that where an account is made up and rendered, he who receives it, is bound to examine the same, or to procure some one to examine it for him; if he admits it to be correct, it becomes a stated account, and is binding upon both parties—the balance being the debt, which may be sued for and recovered at law upon the basis of an *insimul computassent.* So, if, instead of an express admission of the correctness of the account, the party receiving it keeps the same by him, and makes no objection within a reasonable time, his silence will be construed into an acquiescence in its justness; and he will be bound by it as if it were a stated account. [Phillips v. Belden, 2 Edw. Rep. 1.] So in Freeland v. Heron and others, [7 Cranch's Rep. 147,] it was held, that when one merchant sends an account current to another residing in a different country, between whom there are mutual dealings, and he keeps it two years without making any objections, it shall be deemed a stated account, and his silence and acquiescence shall bind him, at least so far as to cast the *onus probandi* on him. In fact, the rule as laid down by the authorities, would seem to be, that if one does not object to a stated account which has been furnished him, within a reasonable time, he shall be bound by it, unless he can show its incorrectness. [Murray v. Toland, 3 Johns. Ch. Rep. 569; Wilde v. Jenkins, 4 Paige's Rep. 481.]

In Leaycraft v. Dempsey, [15 Wend. Rep. 83] the court said, that where a bill is filed to open the settlement of an account, the request is not granted as a matter of course. If the account has been settled, or an instrument executed for the payment of the balance, the error should be specified in the bill. The plaintiff must show clearly, that he has been imposed upon, before the court will allow him to unravel the account. Such, also, is the decision in Philips v. Belden, [2 Edw. Rep, 1.] In the latter case, the court consider the distinction between surcharging and falsi-

fying an account, and accounting generally. It is said, where liberty is given to surcharge and falsify, the court takes the account to be a stated and settled account, and establishes it as such. If either party can show an omission for which an entry of debit or credit ought to be made, such party surcharges, that is, adds to the account; if any thing be inserted which is wrong, he is at liberty to show it, and this is a falsification. The *onus probandi* is always on the party making the surcharge or falsification. But in a general accounting, the party producing the account, to charge his adversary or relieve himself, must show the items to be correct.

The direct inference from the principles stated, is, that a party dissatisfied with a settled account, must in a bill brought for that purpose, state explicitly the grounds on which he seeks to surcharge or falsify it; and that the burthen of making out the case, rests upon him. *Further*, where a merchant furnishes his customer with an account current of his dealings, and the latter retains it in his possession for a considerable length of time, without objection, he will be presumed to have admitted its correctness.

In the present case, the allegations of the bill are attempted to be sustained, by proof that Lea informed the intestate, he had paid for him, his note to Harding, as well as his drafts in favor of Harvey and Webb & Dugger; that this statement was wholly untrue; that intestate was deceived by it, and induced to make the note and execute the deed in question. The evidence of Harding goes to this extent, and so far as it respects his note, is confirmed by the testimony of Walke. Conceding that the proof on this point is sufficient to outweigh the answer, and it by no means follows that such a case is made out as will vacate the note and deed. The conclusion will not then be warranted, that the balance due the defendants, Lea & Langdon, was not equal in amount to the note. It will be remembered, Walke testifies, that although Lea told him, his house had paid the note to Harding, yet in the account which he shewed him, it was not charged:—*Further*, it is admitted in the bill, that Lea & Langdon, in February, 1838, furnished the intestate an account current of all previous dealings. True, it is alleged that this account is imperfect, not because it charges too much, or omits any thing that is proper; but because, in noting the items stated, it is not sufficiently full and explicit. We infer that the account thus rendered, is

identical with that exhibited with the bill. In fact, such an inference is a necessary sequence from the case as presented; for if they were variant from each other, it would have been entirely competent for the complainant to have shown it; and he certainly would have done so, if the claim to relief could have been thus strengthened.

The account exhibited shows, that after placing to the intestate's credit the sum of seven hundred and seventy-one dollars and seventy-five cents, the proceeds of seventeen bales of cotton sold on the 20th of January, 1838, there was due to Lea & Langdon, a balance equal to the amount of the note, saving six hundred and sixty-eight dollars and fifty-three cents, for which a credit was given. It is not alleged that the intestate paid the note which he made in November, 1836, in any other manner than by an appropriation of the proceeds of his cotton crop of that year; nor is it denied by the bill, that he did not after the first settlement, continue to deal with Lea & Langdon as previously.—Taking the case as stated by the complainant himself, and it is clear, that as the cotton sent by him to his factors, was insufficient to extinguish the note, there was due to them a balance thereon; and that that note, instead of being paid in full, was *taken up* by making so much as was due thereon, a part the consideration of the note given in October, 1837. In this view, it is impossible that the intestate could have been charged with the note of Harding, and the defendants to Harvey, and Webb & Dugger; for taking the statements of the bill to be a true, and complete developement of the case, and the last note should have been for a much larger amount than it really is.

Again: The intestate received the account current of Lea & Langdon, in February, 1838, and retained it without objection, so far as we are informed, up to the time his bill was exhibited in January, 1839. This, considering the distance of the residence of the parties from each other, must be regarded as an implied admission that the account was correct. True, it would not operate so conclusively against the complainant, as to prevent him from surcharging and falsifying; but the proof in the cause is insufficeint to authorise relief upon either of these grounds. In fact, the interference of equity is not sought upon an objection to the account, but because the intestate was overreached by Lea, who represented to him that Lea & Langdon had made advances

for him to pay debts which were still outstanding. The chancellor was opinion that this allegation was made out by evidence, and that it warranted a perpetuation of the injunction; because it showed that the defendants, L. & L., had perpetrated a fraud upon the complainant. Without stopping to inquire whether the proof was such as the court of chancery supposed, we are satisfied, that the conclusion there attained cannot be supported.

Here it is admitted, and in fact proved, that all errors in the settlement were to be corrected, and the deed to stand as a security for so much as was really due. If the law were otherwise, this stipulation of the parties, would sustain the deed in despite of fraud on the part of the *cestuis que trust*; to the extract of their demand. But the chancellor's view of the law is incorrect, as applied to a case in the posture in which the present comes before us. It may be conceded as a general rule, that the enforcement of a contract may be prevented, by showing a fraud on the part of him who seeks to derive a benefit from it; unless the fraud has been assented to, or acquiesced in. But it cannot be endured that a debtor should be allowed to become an actor in equity, and avoid a security which he has given for a debt clearly due, merely because he was induced by the false representations of the creditor, made most probably in ignorance of the fact, rather than from a settled purpose to deceive. [See Barnett v. Stanton & Pollard, 2 Ala. Rep. 181.]

In respect to the notes of the intestate discounted by the branch bank at Mobile, in 1838, the proceeds of which were checked out by Lea & Langdon, it is quite enough to say, that there is no allegation in the bill in respect to them; and even if the proof establishes a liability upon Lea & Langdon to account for the money thus appropriated by them, that liability cannot be enforced in the present case.

From what we have said, it results that the complainant is entitled to a perpetual injunction for the sum of six hundred and sixty-eight dollars and fifty-three cents, to be applied as a credit on the note on the 20th of January, 1838; that as to the other matters in controversy, the bill must be dismissed. If Lea & Langdon are liable for the monies checked out of Bank, the representative of the intestate should have the benefit of them in extinguishment of the note and deed of trust; and that he may not be prejudiced in the assertion of his rights, the decree is so far modi-

fied, as to dismiss the bill without prejudice to the matter stated, as the ground of a new suit.

As it does not appear that there was a necessity for a resort to equity, to obtain the credit to which we have seen the complainant is entitled, the defendant in error will be taxed with the costs, both of this court and the court of chancery. The decree will accordingly be reversed, and here rendered in conformity to the views expressed.

CURRIE, ET AL. v. MANN.

1. A purchase, by the plaintiff in execution, of the defendant's land, which had been levied on and sold, is not a satisfaction of the execution, to the amount bid for it, unless he has accepted a deed from the sheriff, or there be a note or memorandum in writing, setting forth the terms of the contract of sale, so as to satisfy the statute of frauds.
2. *Quere*—would not the court grant a perpetual stay of execution in a case where the plaintiff made a valid purchase of the defendant's land at sheriff's sale, which he refused to comply with.

ERROR to the Circuit Court of Barbour.

This was a motion to quash an execution issued on a judgment of the defendant in error, against the plaintiff in error and one Pugh, upon the ground that the execution had been fully satisfied. Upon the trial it appeared, that the sheriff had levied the execution on certain lands of Pugh, which were advertised and sold by the sheriff to the plaintiff, for $301, who refused to take a deed for the land, and comply with the terms of the sale, alleging as his reason, that he had discovered that the land was not the property of the said Pugh. The sale to the plaintiff had never been set aside or avoided.

The court refused to quash, and gave judgment on the motion against the defendants. This is now assigned as error.

WILEY, for plaintiff in error, referred to 1 Porter, 392; 7 Cowen, 6; 1 Ohio, 466.

ORMOND, J.—It does not appear very distinctly from the record, what was the precise question intended to be presented, but we understand it to be, whether under a sheriff's sale a purchase by the plaintiff in execution, of the defendant's land, which had been levied on and sold, is not a satisfaction of the execution to the amount bid for it.

Such would doubtless be the law, if the plaintiff had accepted a deed from the the sheriff, but in this case, it does not appear that the purchase of the land at the sheriff's sale gave the plaintiff any right to demand a title to it, as it does not appear that there was any memorandum or note in writing, setting forth the terms of the alleged sale as required by the statute of frauds, which is as indispensable in sheriff's sales as in other sales of lands. [Garth v. Robinson, *supra.*

As, therefore, it did not appear that the first writ of *fi. fa.* had been satisfied, there was no reason shown for quashing the *alias fi. fa.*

Whether the court would not grant a perpetual stay of execution in a case where the plaintiff in execution had made a valid purchase of land at a sheriff's sale, made under his own execution, which he refused to comply with, is a question we need not now discuss.

Let the judgment be affirmed.

MARTIN v. POPE & SON.

1. A factor, to whom goods are consigned for sale, is entitled to a lien upon them and their proceeds, for advances, and commissions consequent upon their reception, safe-keeping and sale, and for what may be due him upon *a general balance of accounts growing out of similar dealings.*
2. Where a factor makes advances, in the absence of a special agreement, the inference is, that they were made upon the joint credit of the personal security of the principal, and of his goods and money that may come to hand; and he may renounce his lien without affecting his remedy against the person, and *vice versa.*

3. Where a factor sells goods, and appropriates the proceeds to his account against the principal without objection by the latter, the surety of the principal for the payment of a demand of equal dignity to the factor, when sued by the latter, cannot object that the appropriation was not so made as first to relieve him from liability.
4. A factor credited his principal with the proceeds of goods sold, afterwards paid him a part thereof, then sold for him other goods to a much greater amount: *Held*, that a surety of the principal, in an actian by the factor, could not claim a deduction from his liability for the sum credited and afterwards paid over.
5. An indulgence *gratnitously* granted by a creditor to the principal debtor, will not operate a discharge of the surety.

WRIT of error to the Circuit Court of Mobile.

This was an action of assumpsit at the suit of the defendants in error against the plaintiff, on a promissory note made by him, together with Elihu Moffitt and James R. Horn, by which they promised to pay to the plaintiffs below, the sum of two thousand two hundred and twenty-five dollars, ten months after date, and dated the 23d March, 1839. The cause was tried on the general issue, and a verdict returned in favor of the plaintiffs, for the sum of one thousand and fifty-three dollars and thirty cents, on which judgment was rendered.

On the trial the defendant excepted to the ruling of the court, both in charging and in refusing to charge the jury. The material facts of the case are stated in the bill of exceptions, substantially as follows: The plaintiffs were commission merchants of the city of Mobile; Moffitt, who was the principal in the note, was a cotton planter residing in the interior of this State, and in the habit of sending them his crop to sell. On the 23d of March, 1839, he obtained from them $2,000 in cash, for which he agreed to pay 5 per cent. the usual commissions for advancing, and in addition, interest at the rate of 8 per cent. *per annum*. To secure the payment of these several amounts, Moffitt made the note in suit, with the defendant and Horn as his sureties. It was the understanding between plaintiffs and Moffitt, that the latter was to ship cotton to the former, though nothing was said about selling it, and applying the proceeds to the note. In February and March, 1840, Moffitt sent to the plaintiff his cotton crop of 1839, amounting to 113 bales, all of which were sold for the nett sum

of nineteen hundred and nine dollars and sixty-three cents, and on the 17th of June, 1840, they sent him the account of sales, which does not show whether, and how they had appropriated the proceeds In answer to a previous application of Moffitt, not to sue for any balance he might be due the plaintiffs, they say, "we shall be easy about the balance you owe us until next season, when we shall expect it."

Moffitt became indebted to the plaintiffs subsequent to March, 1839, as follows, viz: on the 30th April, 1839, for bagging, rope and twine, $260 81—29th of November, do. $80 16, for do.—30th December, do. $148 40, for do. On the 21st March, 1840, $306, for the hire of negroes, and on the same day, $124 50, being the nett proceeds of four bales of Moffitt's crop of cotton, which had been previously placed to his credit by the plaintiffs.—The aggregate amount of these several sums, the plaintiffs claim the right to retain from the proceeds of Moffitt's cotton, before applying it to the extinguishment of the note in suit. It was proved that money due for negro hire, was not connected with the business of a commission merchant.

The judge charged the jury, that the law relative to a pledge, and the liens which attach to property held in that way, were wholly inapplicable to this case: that the plaintiffs had the right to apply the money received for the cotton, to any item in their account, at any time, if Moffitt, their principal, had given no direction in respect to it. *Further*, the indulgence given by the plaintiffs to Moffitt, would not discharge his security, unless it was upon a contract founded on a valuable consideration.

The defendant, by his counsel, prayed the court to charge the jury, 1. If the plaintiffs received Moffitt's cotton as commission merchants, and he was indebted to them at that time, in an account connected with and growing out of their trade as such, then they would be considered as holding the cotton in pledge for the satisfaction of their account. 2. If the indebtedness of Moffitt to the plaintiffs, consisted of several items, contracted at different times, but all connected with their trade and business, then the money received upon the sale of the cotton, after deducting charges for commissions, &c, shall be applied to their payment according to the order of time in which they were respectively contracted; or if not thus to be extinguished, then according to the time in which the items respectively became due. 3. If the cash

for which the note in suit was given, was advanced by the plaintiffs as the commission merchants of Moffitt, the note operated as a lien upon the cotton sold by them, notwithstanding the defendant and Horn were sureties for its payment, and if the oldest demand of the plaintiffs against Moffitt, it should be first paid from the money in their hands. 4. If the charge for negro hire was not connected with plaintiff's trade as commission merchants, then the money received for the cotton could not be applied to its payment until the note was satisfied. 5. That the payment to Moffitt of $124 50, part of the proceeds of the cotton, with which the plaintiffs had previously credited him, discharged the defendant and his co-surety from the payment of the note *pro tanto*. 6. If the plaintiffs agreed to waite with Moffitt until next season for the balance of what he owed them, with the understanding that he was still to employ them as commission merchants, that would form such a contract for indulgence as would discharge the defendant. 7. If the money now sought to be recovered, was cash advanced by the plaintiffs as commission merchants, to Moffitt, who at that time owed them nothing, and Moffitt sent them his cotton to sell, the application of money received from the sale thereof, to debts subsequently contracted, would be a fraud upon the defendant as a surety of Moffitt, and would operate as a discharge of the note *pro tanto;* which prayer for instruction was overruled *in toto*.

A. F. Hopkins, for the plaintiff in error. The understanding between Messrs Pope & Son and Moffitt, that the latter should ship them his crop of cotton, amounted to a contract which gave a lien for the payment of the money, which the note was intended to secure. That no subsequent advances or dealings between the parties, could in any manner interfere with that lien, or relieve the plaintiffs from thus appropriating the proceeds of the cotton to the defendant's prejudice. The note was prior in point of time, to the other items of the plaintiffs' account, and should be first satisfied. [Paley on Agency, 116–7, 123; 1 Powell on Mort. 558; 1 Story's Eq. 108, 320, 322; 1 Bos. & P. Rep. 563–9; 1 Har. & J. Rep. 465, 754; 16 Peter's Rep. 121; 2 Johns. Ch. Rep. 554; 17 Johns. Rep. 384; 11 Wheat. Rep. 59; 2 Johns. Ch. Rep. 603; 1 Powell on Mort. 434, n. 435, n. 558; 2 Har. & J. Rep. 492; 11 Mass. Rep. 300; 3 T. Rep. 123.]

To show that Pope had discharged the defendant by the indulgence to Moffitt; that they had no right to retain for the hire of negroes and the proceeds of the four bags of cotton paid Moffitt, the counsel cited Paley on Agency, 116–7, 122; 3 Bos. & P. Rep. 485; 1 Story's Eq. 308; 3 B. & Cresw. Rep. 605; 3 T. Rep. 123; 6 id. 258.

J. A. Campbell, for the defendants. A factor has a lien for his general account; and it may be conceded that it is doubtful whether an outstanding independent claim will authorise him to retain the property of his principal, or its proceeds. [3 Bos. & P. Rep. 495.] That a factor may hold the possession of property upon which he has made advances, and control the proceeds after a sale to reimburse himself for a general balance growing out of the business, cannot be denied. But he is not bound to exert it; whether he will do so or not, must depend upon his own volition; and no third person, although he may be a surety for the principal, can complain that its exercise has been omitted. [4 Johns. Rep. 112.] This lien is analagous to the right of set-off, and authorises the factor to hold the property or fund, as against an adverse claimant until his demand is satisfied; it is called into action, when a right is set up by a third person.

Moffitt never directed Pope & Son to make any particular application of the monies arising from the sale of his cotton, and it was consequently competent for the latter to apply them to either of their demands. They might have paid them over to Moffitt, if so inclined; or even have set-off against an action brought by him the sum due for the hire of negroes. The case in 16 Peters' Rep. 121, is clearly against the plaintiff—it shows that the commission merchant is bound to appropriate the proceeds of cotton to debts due at the time it is sold, and this, although the particular debt may not have been contracted in the course of his usual business. Unless it be by a distinct agreement, the surety can have no control over the manner in which the principal shall make his payments. [1 Stark. Rep. 101; 11 Serg't & R. Rep. 34. See cases in 3 Peters' Dig. 201; 10 Pick. Rep. 129; 2 id. 581, 612; 12 Wheat. 505, 554.]

COLLIER, C. J.—It is not pretended that there was a special contract between the plaintiffs and Moffitt, in respect to their

transactions, which would vary the duties and liabilities of the former as the factors of the latter. We must then consider the case in reference to the principles of law applicable to such agents when dealing with their principals.

The engagement of a factor who undertakes the sale of goods or merchandize, for a compensation, is, that he will faithfully dispose of the same, with a proper regard to the advices of his principal, and honestly account for the proceeds. He is entitled to a lien, not only upon the goods themselves, for advances, and for commissions consequent upon their proceeds, and for what may be due him upon *a general balance of accounts growing out of similar dealings.* This lien arises upon an agreement which the law implies in the absence of any express stipulation upon the subject. [Paley's Ag. 127–8–9, 142–7; Story's Ag. 421, 435.]

In Houghton, et al. v. Matthews, et al. [3 Bos. & Pul. Rep. 485,] it was decided that the demand for which the factor claimed a lien, must be connected with, and constitute a part of his dealings as such, with his principal; for if it was a species of debt foreign to that relation, or accruing before its commencement, the lien would not be enforced. [Paley's Ag. 135–6–7; Story's Ag. 387–8–9.]

The correctness of these principles is conceded by both parties, but it is argued for the defendant, that the plaintiffs had a lien upon the cotton consigned to them by Moffitt, and since its sale upon the proceeds; that they cannot relinquish their lien and resort to an action against the sureties of their principal, but must appropriate the money received by them to the payment of their account as factors, in the order in which the advances were made, or in which the respective sums charged, became payable.

The general lien of factors does not depend upon any express contract, but rests upon its manifest tendency to aid the interests of trade and commerce, and to promote confidence and a liberal spirit on the part of factors in respect to advances to their principals. It is deemed to exist in all cases, until the contrary presumption is clearly established. [Story's Ag. 388–9; Paley's Ag. 127–8.] And where a factor makes advances, independent of an actual agreement to that effect, the legal inference is, that they were made upon the joint credit of the personal security of the principal, and of his goods and money that might come to hand. This being the case, the factor may relinquish his lien on the lat-

ter without at all affecting his personal remedy; so he may renounce his right to resort to the person, and look alone to his lien for reimbursement. [Burrell v. Phillips, 1 Gall. Rep. 360; Piesch v. Dickson, 1 Mason's Rep. 9.] It is then a right of which the factor or his representatives may avail themselves; but where there is no contract other than that which is implied, one who has become a surety of the principal to refund advances made to him, cannot elect for the factor, and force him (at least at law,) to assert his lien upon the goods or money of the principal.

The case of Brander & McKenna v. Phillips, et al. [16 Peter's Rep. 121,] which was cited for the plaintiff in error, bears but little resemblace to that now before the court. In that case the plaintiffs were the factors of Phillips & Co.. sold cotton for them for two and a half per cent. commissions, and charged the same for advances. In August, 1834, Phillips & Co. were indebted to the plaintiffs in the sum of $1315 57, for advances. On the 15th of the same month, the agent of the plaintiffs agreed to advance Phillips the sum of $8,000 on bills to be drawn between the 20th of April and 31st July, 1835, by them, and any two of six persons named; among whom were R. H. & N. T., two of the defendants. Between the 15th of August, 1834, and the 31st July, 1835, several shipments of cotton were made to the plaintiffs by Phillips & Co., and several bills were drawn by them, some jointly with R. H. and N. T., and others without them; all of which were accepted by the plaintiffs. The bills and advances amounted to $29,795 65: and the proceeds of the cotton amounted to $22,-460 43. The proceeds of the cotton were applied to the bills drawn by Phillips & Co. to the exclusion of those drawn by them jointly with R. H. and N. T.; and the question was, whether if the plaintiffs had sufficient funds of Phillips & Co. in their hands, when these latter bills became due to pay them, they were not bound to pay them, instead of retaining it for the payment of those which subsequently matured. The court said, "the application of payments by the creditor, where no direction is given by the debtor, has no relation to the present case. Had the bills become payable at the same time, on acceptances made on the same day, the plaintiffs might have insisted on applying the funds in their hands to the payment of the notes without securities. But this would have been a very different case from the one now before us. After having accepted the bill under consideration, pay-

able at a time stated, the plaintiffs accepted other bills, payable at a more remote period.

Now, the contract by the acceptors was, that they would pay these bills as they respectively became due. And this they were bound to do so long as the funds of the consignors in their hands remained unexhausted. A bill became extinguished as soon as it was paid by the plaintiffs with the funds of Phillips and company. And this principle applies as strongly to those bills signed by the accommodation drawers, as others."

Again: "The plaintiffs, by appropriating the proceeds of the cotton to the payment of future liabilities, have violated their contract, endeavored to defeat the just reliance of the sureties, and charge them with the payment of the bills which they guarantied. This the plaintiffs cannot do. It would be a great hardship, if not a fraud on the sureties. No lien can be regarded or enforced under such circumstances. The lien of a factor depends upon legal principles, founded on equitable considerations, and can be held valid on no other grounds."

This case merely determines, that the acceptor of bills is bound to pay them at maturity; that if in funds of the drawer, he should use them for that purpose; and where they became payable at different times, he cannot use his own funds to pay those that first mature, and pay those subsequently falling, with the money of the drawers, so as to entitle him to recover the amount of the former, of persons who joined as sureties in drawing them. There, the factors, by their acceptance, came under obligations to pay money at an appointed day, and being in funds of the persons for whom they had undertaken, it was their duty to appropriate them. Here, they had entered into no such engagement. They had merely advanced money to, and had allowed one of their customers to become indebted to them, by furnishing him goods, &c.; and this without any contract, though doubtless in the expectation that he would send them cotton. The several sums in which he was indebted, must be considered as constituting his liability to them, and stand upon an equal footing so far as the present case is concerned. This conclusion, as it respects the note in question, results from the absence of any contract varying the rights and obligations of the sureties; and in regard to the charge for negro hire, it is immaterial whether it arises out of the plaintiffs' dealings, as factors, with Moffitt, and could only be material,

if they were asserting a lien upon the cotton or its proceeds. But the question of the right of lien, or the duty of the factors to exert it, cannot be raised in this case. Moffitt's cotton has been sold by them, and its proceeds appropriated *pro tanto* to extinguish his indebtedness, without any objection, of which the record informs us, either by himself or his representatives. It is, then, the case of a creditor paying money to his debtor without any specific direction as to its application.

It is laid down generally, that where money is paid by a debtor to a creditor, who has several demands against him, without directing how it shall be applied, the creditor may apply it as he pleases. [Smith v. Scriven, 1 McC. Rep. —; Goddard v. Cox, 2 Strange's Rep. 1195. See also 2 East's Rep. 242.] In The Mayor, &c., of Alexandria, v. Pattern, et al., [4 Cranch's Rep. 317,] the court say, "It is a clear principle of law, that a person owing money on two several accounts, as upon bond and simple contract, may elect to apply his payments to which accounts he pleases; but if he fails to make the application, the election passes from him to the creditor. No principle is recollected which obliges the creditor to make this election immediately. After having made it, he is bound by it, but until he makes it, he is free to credit either the bond, or simple contract." To the same effect is The United States v. January & Patterson, [7 Cranch's Rep. 471.]

In Gwin, et ux. v. Whitaker, adm'r, [1 Har. & Johns. Rep. 754,] it was determined, that where one is indebted upon several accounts, and makes a payment, without directing its application, if both the securities carry interest, or neither bear interest, the creditor may apply it. So, if one is indebted on bond or mortgage, and simple contract, the law, in the absence of direction from the debtor, will apply a payment to the bond and mortgage. *Further*, it was said, that sometimes the fund, out of which the money arose, will direct the application; as where one, indebted on bond and on judgment, sells his land, and the purchaser pays a sum of money to the creditor without applying it, the law will apply it to the judgment, so as to exonerate the land.

In Alson's adm'r v. Contee's ex'r, [4 H. & Johns. Rep. 351,] a debtor made a payment to a creditor, who had two claims on open account, without directing its application: under the circum-

stances, the court thought the money should go in extinguishment of the oldest account. And in Bacon v. Brown, [1 Bibb's Rep. 334,] it was decided, that if the debtor does not apply a payment, the creditor may direct its application to any one of several demands where they are of equal dignity, parallel in their consequences, and charge upon the debtor. That equity would direct a payment to be applied to debts bearing interest; but the creditor cannot apply it to a demand not yet payable. [See also Heyward v. Lomax, 1 Vern. Rep. 24.] The inference from the facts recited in the record, is, that all the items composing the plaintiffs' account, were for money due them before they had sold all the cotton consigned them by Moffitt; as the last charge is dated on the 21st March, 1840, and the cotton was sold on the 17th of that month and in April following. Again; they are all of equal dignity as it respects priority of payment; and from the time the plaintiffs were entitled to be paid, they drew interest in the same manner, whether evidenced by writing or not.

As it respects the sum of one hundred and twenty-four 50-100 dollars, paid Moffitt by the plaintiffs, defendant cannot object that it should have been credited to Moffitt's account. And whether it had been thus previously credited or not, is wholly immaterial; for they subsequently sold for Moffitt between six and seven hundred dollars' worth of cotton, that was placed to his credit, which we have seen the plaintiffs might have paid over to him without affecting their claim against the defendant. The form in which the account is stated cannot prejudice either party: courts of justice will look at the substance of the thing.

The facts do not show that there was a valid agreement between the plaintiffs and Moffitt, by which the former was to extend the day of payment of the note in controversy; what the plaintiffs said to him was entirely gratuitous, and they could have put the note in suit at any time after its maturity.

Without extending this opinion, by a particular examination of the charges given and refused, it will be readily perceived from what has been said, that no error has been committed which is available for the defendant below. The judgment is consequently affirmed.

COKER v. PEARSALL.

1. Upon the forfeitnre of a mortgage, the mortgagee becomes not only entitled to the possession of the mortgaged premises, but also to the rent then in arrear and unpaid, upon notice to the tenant in possession.

ERROR to the Circuit Court of Franklin.

Debt on promissory note, by the defendant against the plaintiff in error.

The defendant pleaded *nil debit* and payment, and a special plea, that the note sued on was given for the rent of certain lands in Franklin county, for the year 1840; which lands had been previously, to wit: in 1836, conveyed by deed of mortgage, by John L. McRae, to one S. R. Cockrell; and afterwards, on the 11th January, 1840, the said McRae conveyed by deed the equity of redemption to the plaintiff. That after forfeiture of the aforesaid mortgage, and whilst it was in full force, he had notice from the mortgagee, that he held him liable for the rent of said lands. That on the 15th June, 1840, the plaintiff conveyed to S. R. Cockrell the equity of redemption, without reservation of the rent; and the said McRae also conveyed in fee to the said Cockrell; and that defendant attorned to the said Cockrell, and paid him the rent for which the note sued on was given; and this, &c.

The plaintiff replied, that when Pearsall made the conveyance, as aforesaid, to Cockrell, it was with an express reservation of the lands so conveyed for the year 1840.

Issue being taken on these pleas, the defendant read in evidence to the jury, the deeds mentioned in the pleas; whereupon the plaintiff, by his attorney, introduced a witness to prove, that by a parol agreement, made at and previous to the signing, sealing and delivery of the deeds, in fee for the lands described in the pleas, the rent for the year 1840 was reserved to the plaintiff. To which evidence the defendant objected; but the court overruled the objection, and permitted the testimony to go to the jury; to which the defendant excepted, and which he now assigns for error.

Noor, for plaintiff in error, insisted, that as the mortgage was forfeited, the fee was in Cockrell, and he was, therefore, entitled to the rent independent of the conveyances of the land to him in June, 1840, [3 Stewart, 50; 9 Cowen, 38,] and that the tenant was justified in attorning to him, and in paying him the rent. [20 Johns. 51.]

But the right of Cockrell to the rent, was placed beyond doubt by the conveyances of June, 1840, by which he became the absolute owner of the soil, the rent being a mere incident of, and following the fee.

The introduction of parol evidence, to show that the rent was reserved, when the deed is silent as to any such reservation, was clearly erroneous, as it varied, by parol, the terms of a written contract, and there was no allegation of fraud, which could alone authorize its introduction. [5 Porter, 498; 1 Ala. 160; id. 571; 1 J. C. R. 429; 8 Johns. Rep. 189.]

Cooper, *contra*. Pearsall was either the tenant of McRae, or the purchaser of his possessory interest; and in either case, had paid in advance for it. Cockrell purchased with notice of the interest of Pearsall; and as Pearsall did not owe rent to McRae, his release to Cockrell of all his interest did not extinguish the rent. [9 Cow. 39.]

The parol evidence did not contradict the written instrument, but was proof of a collateral fact.

As the tenant cannot deny the title of his landlord, the only mode by which the defendant could be relieved, would be by a bill of interpleader, if his view is sustained by the court.

ORMOND, J.—Upon the forfeiture of the mortgage, Cockrell, the mortgagee, became entitled to the possession of the mortgaged premises; and upon notice to the tenant, the latter became responsible to him, not only for the rent falling due subsequently, but for the rent then in arrear. [See Moss v. Gallimore, Douglass, 266, where the doctrine, and the reason upon which it is founded, are stated at large. To the same effect is Mansony & Hirtel v. The U. S. Bank, 4 Ala. 746; and Chambers v. Mauldin, id. 477.]

The plea does not, it is true, expressly allege notice to the tenant, but it does allege that the tenant attorned to the mortga-

gee, and paid him the rent, which must be considered an admission of notice that the mortgage was forfeited, and that the mortgagee was entitled to the rent. Such being the case, he was not responsible to the mortgagor, or those claiming under him; and it became, therefore, unnecessary to consider the effect of the reservation of the rent by parol, where the conveyance of the fee was made to Cockrell, because there was no right existing either in McRae or Pearsall to be reserved.

It results necessarily, that the court erred in permitting the evidence to go to the jury; and the judgment must be, therefore, reversed, and the cause remanded.

JEFFORD'S ADM'R v. RINGGOLD & CO.

1. In an action against an administrator, it is not allowable to declare in one count upon a demand for which he is liable individually, and in another for a debt due the estate he represents; such a declaration would be objectionable on general demurrer for a misjoinder of counts.
2. Although infancy is a personal privilege, yet not only the infant may avail himself of it, but his executor or administrator when sued upon the intestate's contract, may also plead it.
3. An executor or administrator may ratify the contract of his intestate made during his infancy, although the intestate died before he attained his majority; and such ratification will be obligatory, though it was verbally made, without any new consideration.
4. It is difficult to lay down a precise rule, as to what notice to produce a writing is necessary, to let in secondary evidence of its contents; but a notice to the plaintiff's attorney several days before the term of the court when the cause was tried, is *prima facie* sufficient, although the plaintiff resided without the State; if the plaintiff was ready to produce it, and was unwilling that parol evidence should be given, he could have applied for a continuance.

WRIT of error to the County Court of Lowndes.

This was an action, at the suit of the defendants in error against the plaintiff. The first count of the declaration is on a promissory note made by the intestate, and another on the 17th

August, 1837, for the payment of three hundred and thirty-three dollars to the plaintiffs. The second count is the same as the first, except that it alleges a promise by the defendant, since the death of his intestate, to pay the note. The third count alleges the making of another promissory note of the same tenor and date, and sets forth that its consideration was a house and lot in the village of Lowndesborough, Lowndes county, which the plaintiffs had agreed in writing to convey to the intestate in his lifetime; that the intestate died before the note was paid, or the house and lot conveyed; that at the particular instance and request of the defendant, the plaintiffs conveyed him the house and lot for the use and benefit of his intestate's estate, in consideration of all which the defendant became liable and promised to pay the note in question when he should be requested. The fourth count describes, as the cause of action, a note of the same tenor and effect as that set forth in third, founded upon the same consideration; and then alleges, that the intestate was an infant under the age of twenty-one years when the note was made, and died during his minority; that the defendant confirmed the contract for the conveyance of the real property, and took a conveyance for the same in his own name; in consideration thereof, he became liable to pay the note declared on according to its tenor and effect. The declaration then concludes as follows: "Yet the said John W. Jeffords, not regarding his said several promises in the three last counts mentioned, has not paid the same or any part thereof. And the said intestate or defendant, not paying the money in the first count named, by reason of the premises, plaintiff has sustained damages for seven hundred dollars—and he brings his suit," &c.

The defendant pleaded—1. That his intestate did not undertake and assume, as the plaintiffs have alleged, &c. 2. That intestate was an infant at the time the supposed promise and undertakings, mentioned in the plaintiff's declaration, were made. On the first plea, the plaintiffs took issue; and to the second, they replied, that the intestate died during his infancy; and the defendant, after his appointment as administrator, ratified and confirmed the promises and undertakings in the declaration mentioned. To this replication, the defendant demurred, and his demurrer was overruled; thereupon the cause was submitted to a jury, who returned a verdict for the plaintiffs for the amount of the note and

interest, and judgment was rendered accordingly. On the trial, the plaintiffs, in order to establish the confirmation of the contract of purchase by the defendant, proved that on Friday preceding the commencement of the term of the court, when the cause was tried, he caused a notice in writing to be served upon the attorney of record of the defendant, at his office in Lowndes county, requiring him to produce at the trial the deed which the defendant had received for the house and lot referred to in the declaration; and also proved that the defendant had an agent, resident within the county, to attend to this case. The fact that there was such a deed, was proved by a witness, who also stated, that the last time he saw it, it was in defendant's possession; that defendant resided in Charleston, South Carolina, and had not lately been in this State. Upon this proof, the defendant objected to the admission of parol evidence of the contents of the deed, on the ground that the notice to produce it had not been given a sufficient length of time before the trial to enable him to bring it into court; but the objection was overruled, and the plaintiffs were permitted to give parol evidence of the contents of the deed. Thereupon the defendant excepted, and his exception is duly certified.

N. Cook, for the plaintiff in error, made the following points: 1. The demurrer to the replication should have been sustained to the declaration; because the plaintiffs declare upon several causes of action which could not be joined. 2. The replication is bad, because it does not allege any consideration moving to the defendant in order to make the confirmation of the intestate's promise binding in law. 3. Parol evidence of the contents of the deed was inadmissible upon the proof made by the plaintiffs. [8 Porter's Rep. 529; 9 id. 39; 2 Ala. Rep. 58; 3 id. 449.]

No counsel appeared for the defendants.

COLLIER, C. J.—1. If the declaration be defective for the cause supposed, it was certainly obnoxious to the defendants' demurrer to the replication. It is said the consequences of a misjoinder are more important than the circumstance of a particular count being defective; for in the case of a misjoinder, however perfect counts may respectively be in themselves, the declaration

will be bad on general demurrer, or in arrest of judgment, or upon error. [1 Chitty's Plead. 3d Am. ed. 206, and cases there cited.] We will not undertake to examine, with particularity, each of the counts of the declaration in the case before us, to ascertain whether, separately considered, they each disclose a good cause of action. The conclusion of the declaration very explicitly indicates that the plaintiffs themselves regard the first count as imposing a liability upon the defendant in his representative character; and by the three latter, they seek to enforce a recovery in his own right, for promises which they suppose subject him to a personal charge. Now, although it may be allowable to join promises by a testator or intestate, and an executor or administrator, on a contract or liability made or incurred by the deceased in his lifetime; yet it is apprehended, that no case can be found in which it has been permitted to recover in the same action against a personal representative upon a demand with which he is chargeable as such, and also upon one which binds him individually. There would of necessity be two judgments in such case, entirely dissimilar; in the one, the assets of the estate of the deceased would be charged; while in the other, the estate both real and personal of the defendant would be subjected to its payment. This, of itself, would be quite sufficient, if there were no other reason, to show the impropriety of thus declaring. [Sibbil & Lloyd v. Borden, 6 Hals. Rep. 163; 2 Lomax' Ex'rs, &c. 271, et post.] It results from this view, that the declaration, considered as entire, is bad; and that it should have been so adjudged on demurrer.

2. It is laid down generally, that infancy is a personal privilege to be taken advantage of by the infant. [6 Dane's Ab. 132; Van Bramer, et al. v. Cooper, 2 Johns. Rep. 279; Hartness, et al. v. Thompson, et al. 5 Johns. Rep. 160; United States v. Brainbridge, 1 Mason's Rep. 78.] But although the right to avoid a contract, on the plea of infancy, is said be personal, yet it is held, that one who legally represents an infant, as an executor or administrator, may avail himself of it. [Beeler v. Bullit, 3 A. K. Marsh. Rep. 280; Smith v. Mayo, 9 Mass. Rep. 62; Hussey v. Jerett, 9 Mass. Rep. 100; 2 Kent's Com. 236, and cases cited.] And upon principle, it would seem this should be the law; as executors and administrators represent, in all matters in which the personal estate is concerned, the person of the deceased. They

have the same property in the chattels of their testator or intestate, as he himself had when living, and in general succeed to his rights of action, and are subject to his liabilities, at least to the extent of assets received. [2 Steph. Com. 243.] This being the case, the second plea of the defendant may be assumed to have been well pleaded; and the question, then, is, does the replication set up sufficient matter of avoidance. It cannot be denied, that the contract of an infant may be ratified by him after he attains his majority. [Borthwick v. Carruthers, 1 T. Rep. 649; Cohen v. Armstrong, 1 M. & S. Rep. 724; Thornton v. Illingworth, 2 B. & C. Rep. 824.] But it is insisted, that in order to make the ratification by his administrator available, it must be founded upon some new consideration. It is said to have been once supposed, that an executor was chargeable in his right *only*, where an action was brought against him on promises made after the testator's death. But modern decisions determine, that an executor or administrator may be sued, as such, on a promise made by him in his representative character; and that he will only be chargeable to the same extent, as he would on the testator's promise. [2 Lomax's Ex'rs, &c. 272.] The statute of frauds, in order to make him liable out of his own estate, requires that the promise should be in writing; the decisions are, not only that it should be in writing, but founded upon a sufficient consideration. [Clay's Dig. 254; 2 Lomax' Ex'rs, &c., 273–4–5.]

A promissory note, such as that declared on, when made by an infant, is not absolutely void, but merely voidable, and as it is presumable it is founded upon a valuable consideration moving from the payee, the maker after he attains his majority, may by a verbal promise, impart to it validity. Such promise will be effectual, because it only makes that a legal duty, which was before a moral obligation. [Goodsell v. Myers, 3 Wend. Rep. 479; Willard v. Stone, 7 Cow. Rep. 22; Everson v. Carpenter, 17 Wend. Rep. 419; Dockery v. Day, 7 Porter's Rep. 518; 4 Kent's Com. 236; Wright v. Steel, 2 N. Hamp. Rep. 51; McCrilles v. Howe, 3 N. Hamp. Rep. 348; Orvis v. Kimball, id. 314.] But if the infant, instead of ratifying his contract after he becomes twenty-one years of age, disaffirms it, it is, as it respects the other party, entirely at an end, and he becomes re-invested with a right to whatever he had parted with as an inducement to the infants undertaking, and may reclaim it as if the property had never pass-

ed from him. [Badger v. Phinney, 15 Mass. Rep. 359.] This being the case, as a question of sheer interest, to say nothing of the obligations of moral duty, it must frequently be for the advantage of one who enters into a contract during infancy, not to avail himself of his minority in order to avoid it, If then the promissory note of an infant, is only voidable at his election, it may be for the interest of creditors and distributees, and results from the necessary discretion with which executors and administrators are vested, to permit his personal representative to forego the defence of infancy. And in order to make his ratification binding upon the estate, we can perceive no reason why he should receive a new consideration. The note, it is presumed, was given for something equivalent to the sum expressed upon its face, and its non-payment furnishes a sufficient consideration to support the administrator's promise made in that character. It has been held that an executor or administrator is not bound to plead the statute of limitations, and that he may re-affim the liability of the estate he represents, by a promise to pay. [Greening, ex'r, v. Brown, Minor's Rep. 353; Bond v. Smith, 2 Ala Rep.] By parity of reasoning, it would seem, that he need not set up the plea of infancy; more especially if his success, instead of benefiting, would really prejudice the estate. The fact that the intestate died during his minority, cannot impair the powers of his administrator; the law recognizes no distinction between the representative of an adult and an infant; and though the latter could not bind himself but in certain excepted cases; the authority of his administrator is none the less extensive for this case. From this reasoning, it results that the replication was a good answer to the plea, and the demurrer, so far as it was concerned, properly overruled.

3. It is not objected that the notice to produce the deed was given to the attorney instead of the defendant himself. The act of 1818, expressly declares, that in all cases pending before any of the courts of record, written notice to the attorney of record, shall be as valid and legal, to all intents and purposes, as if served on the party in person. [Clay's Dig. 337, § 137.] The cases cited by the plaintiff in error upon this point, do not sustain him, they rather show that it is difficult, if not impracticable, to lay down a precise rule, as to what notice to produce a writing is necessary, in order to let in secondary evidence of its contents. If the

party to whom the notice is given, has had *prima facie* sufficient time to produce the paper, and is still unable to do so, if he is unwilling that its contents should be proved by parol, he may apply for a continuance; but an objection at the trial, that the notice was too short to enable him to comply with it, would be listened to with little favor. The notice in the present case, we think, was entirely sufficient. It was given several days previous to the sitting of the court; how long before the trial does not appear.—The plaintiffs might very well have inferred that the defendant had placed in the hands of his attorney or resident agent, all the papers relating to the cause; and upon this hypothesis, the plaintiffs are not chargeable with neglect. But upon the first point considered, the judgment of the county court is reversed, and the cause remanded.

WINSTON v. JONES AND HAIGH.

1. A testator, by his will, gave to his wife a life estate in one-third part of his land, a fifth part of his estate absolutely. He then proceeded to declare his intention to do equal justice to his children, and after reciting that he had previously given to a daughter, Mrs. W., certain property, in trust, which he estimated at one dollar, proceeded thus: "Now it is my will that after the payment of all my just debts, and allotting to my wife her portion, as herein before directed, to add to the residue of my estate of every description, the said sum of one dollar, the value of the property conveyed in trust for the use of Mrs. W., and to divide the sum total after making such addition, into seven parts, and I do hereby direct and require my executors to distribute and pay over the residue of my estate, both real and personal, in the following manner, to-wit; after deducting from one of said seven parts the sum of one dollar to pay over to said trustees the residue of said portion of Mrs. W., to be held for her use and benefit, and that of her heirs, and to pay to my daughters C. W., M. A., L. C., M. H., and to my sons J W. J. and W. B. J. one-seventh part of the residue of my estate as aforesaid, or to their legal representatives respectively. *Held*, that the executors were invested by the will with the power of selling the lands of the deceased to enable them to make distribution among the legatees.

ERROR to the Chancery Court of Franklin.

The bill was filed by the plaintiff in error, and alleges, that he became the purchaser of a tract of land in Franklin county, containing seven hundred acres, at a sale at public auction, in January, 1837, by the defendants in error, as executors of Arthur Jones, deceased, for which he agreed to pay twenty-one thousand seven hundred and eighty dollars, in two instalments, for which he executed two notes, and received from the defendants in error, at the time, the following bond for title.

Know all men by these presents, that we, John W. Jones and Jacob Haigh, executors of Arthur Jones, do obligate and bind ourselves to William Winston, to convey and make a deed in fee simple, to the tract of land purchased by said Winston at the sale of the effects of A. Jones, deceased, for which the said Winston became the purchaser at public auction, the title to be made on the last payment. Witness our hands and seals, the 8th May 1837.

JOHN W. JONES, [Seal.]
JACOB HAIGH, [Seal.]

That at the time of the sale, the executors alleged and professed to have power to make the sale. That he went into possession of the land, and has retained possession ever since. That he has fully paid the purchase money, and in April, 1839, demanded a title. That soon thereafter, he learned that the defendants in error had no power to sell and convey the lands which they had falsely and fraudulently alleged they had power to do.

That complainant then offered to take a conveyance from the adult heirs of Jones, and a covenant from four of them, that the minors should convey their interest when they became of age, which they agreed to—that having waited a long time, and the conveyances not being made, and one of them refusing so to do, on the 17th February, 1842, he gave them a written notice, that he abandoned the contract and required a return of the purchase money, and that if he retained the possession, it would be to prevent damage to the premises, and not as owner.

That he has recently learned that Sarah Washington is entitled to a trust estate in one seventh part of said land, to her sole and separate use, under the will of Arthur Jones, and that the executors could not sell her interest, but are trustees for the same.

That both Jones and Haigh reside out of the State, and that the latter is reputed to be insolvent, or greatly embarrassed.

The prayer of the bill is, that the contract of purchase be set

aside, and the purchase money restored to him, and that the interest of Jones & Haigh in the land, be sold to pay the same, and for general relief.

The will of Arthur Jones, which is made an exhibit, is as follows:

I, Arthur Jones, of Franklin county, in the State of Alabama, being of sound mind and memory, and desirous while in health, to provide for the hour of death, do make this my last will and testament, viz. After the payment of all my just debts and funeral expenses, I give and bequeath to my wife, Anna Jones, should she survive me, an estate during her life, in one third part of such lands as I may die seized of, according to quality and quantity, her portion to include the dwelling house, and also one fifth part of the personal estate, after paying my debts, to her and her heirs forever.

And as it is my wish and intention to do equal justice to all my children, and give to each, as nearly as practicable, an equal portion of my property, and as I have heretofore given to each of them, as they became of age or were married, about an equal portion, except that in addition to the portion of my daughter, Sarah W. Washington, conveyed by deed of trust, duly executed, and bearing date the 26th July, 1834, certain other property therein specified, to Jacob Haigh and John W. Jones, as trustees of her, my said daughter, of the value of one dollar. Now it is my will and desire, that after the payment of all my just debts, and allotting to my wife her portion, as herein before directed, to add to the residue of my estate of every description, the said sum of one dollar value of property, conveyed in trust for the use of my daughter, Sarah W. Washington, and to divide the sum total, after making such addition into seven parts; and I do hereby direct and require my executors, herein after named, to distribute and pay over the residue of my estate, both real and personal, in the following manner, to wit: After deducting from one of said seven parts, the said sum of one dollar, conveyed for the use of my daughter, Sarah W. Washington, to pay over to said trurtees the residue of said portion, to be held by them in like trust, for her use and benefit of her and her heirs, and to pay to my daughter, Catharine B. Winston, and Martha W. Adair, and to my son John W. Jones, to my daughter Lucy H. Carroll, and Matilda Haigh, and to my son Wiley B. Jones, one seventh part of the

residue of my estate as aforesaid, or to their legal representatives respectively, and I do hereby constitute and appoint John W. Jones, Isaac Winston and Jacob Haigh, executors of this my last will and testament.

The bill being demurred to, the chancellor dismissed it, on the ground, that the complainant had adequate remedy at law on the bond given for title. From this decree, this writ is now prosecuted.

Cooper, for the plaintiff in error—argued, that until a deed was executed, the contract was executory, and that although there was neither fraud nor warranty, yet if a good title could not be made, a court of chancery would rescind the contract. [5 Paige, 300; 2 Brock. 306; Sugden on Vend. 260; 3 Peters' Con. R. 523; 11 Johns. 527, 12 id. 436; 14 id. 363, 453; 7 Mass. 31; 1 Dana, 305; 2 Kent's Com. 473; 1 Peters' R. 468; 3 Atkins, 185; 2 Edwards, 37.]

Noble and McClung, *contra.*—A sale was necessary, in order to carry out the intention of the testator, and therefore, by necessary implication, he has the power to sell. [1 J. C. R. 498; 6 id. 70; 2 P. Will. 194; 2 H. B. 450; 7 Cowen, 194; 5 East, 87; 5 Term, 292; 6 id. 70; 8 id. 1; 4 Ala. 21. 627; 5 How. 460; 5 Litt. 247.]

There is no equity in the bill. Chancery will not relieve for defect of title where this is a warranty, and there has been no eviction or fraud, but will leave the purchaser to his remedy at law. [Sug. 3 Ed. 346–7; 1 J. C. R. 218, 575; 2 id. 519; 5 id. 32; 2 Caine, 188; 5 Paige, 307; 26 Wend. 109.]

Where fraud is relied on, it must be distinctly alleged. [5 Litt. 248; 2 Ala. 604; 3 id. 252, 357, 318.]

Time is not of the essence of the contract. [Story's Eq. 85; Newland, 235; Sugden, 244; 5 C. E. C. R. 504; 1 Atk. 12; 1 J. C. R. 370; 8 Cranch. 471; 1 J. J. M. 597; 2 Bibb. 566; 7 Vesey, 272.]

There is a plain difference between a specific performance, and the rescission of a contract applicable to this case. [1 Dess. 382; 4 id. 132; 5 Paige, 307; 1 Vesey, 279.]

Equity requires diligence and promptness, in urging a rescission, even where fraud has intervened, and in such cases will pre-

sume a waiver, and leave the party to his remedy at law. [4 Ala. 38; 1 Bibb, 212; 4 id. 183; 2 Munroe, 16; 4 Dess. 135; 7 Ves. 272; 8 id, 689; 1 Pow. 306; 2 id. 153; 221.]

As to the parties residing out of the State, see 2 Porter, 351.

ORMOND, J.—The principal question in the cause, the power of the executors under the will to sell the lands of the testator for the purpose of distribution, is one of some difficulty, depending upon the construction of an inartificial and badly drawn will.

No precise form of words is necessary to the creation of a power; if the intention to confer the power is apparent, to enable the executor to execute the trusts of the will, the power will be implied. Thus, if land is devised to an executor for the purpose of paying the debts of the deceased, a power of sale will be implied. [Blatch v. Wilder, 1 Atk. 419, and note 1; 1 Sheppard's Touch. 43; 1 Sugden on Pow. 115.] So, where land is directed generally to be sold, without providing by whom, for the purpose of paying debts and legacies, as the product of the sale is to be applied by the executors, a power of sale will be implied to them. [Tilden v. Hyde, 2 Sim. & St. 238.]

In this case, it is very clear that the distribution of the estate, both real and personal, is given to the executors. The only question, therefore, is, whether the testator designed that the land should be sold in order to distribution being made.

The general conception of the will, avowed at the out set, is, an equal division of all the testator's property among his children. He first gives to his wife an interest in his land equal to her dower, and a portion of the personal estate; the executors are then required, after the payment of his debts, *to add to the residue of his estate of every description*, the sum of one dollar, which he estimates as the value of certain property he had previously given to his daughter, Sarah Washington; and after making such addition, to divide the sum total into seven parts. The executors were then required to *distribute and pay over* the residue of the estate, *both real and personal*, to each of the seven children, deducting from the share of Mrs. Washington, the sum of one dollar.

The terms, "add to" and "divide into seven parts," necessarily imply that there was some fund, similar in kind, with which the addition could be made, and which, when added to, would be

susceptible of division into parts. But how could money be added to land, and the product be divided into equal parts? Again: these parts so obtained, are to be paid over to the legatees severally. The use of these terms is quite persuasive that the prevailing idea in the testator's mind, was that of a sum of money which might be added to, divided, and paid over.

This view is greatly strengthened by the opposite construction, the one contended for by the counsel for the plaintiff in error, that the land itself was to be equally divided among the heirs. If this be so, then the power of allotting it in specie to the legatees, is given to the executors. The land was, it appears, a plantation, consisting, of course, of land cleared for cultivation, and a portion in a state of nature; and, therefore, necessarily of unequal value. To make the different parcels of equal value, it would be necessary that some should be smaller, and some larger than others, and it would be in their power, as it would be their duty, to designate which parcel each of the legatees should be entitled to; for the will is express that the executors shall distribute and pay over the estate, both real and personal. That such a power as this should be intended to be conferred on the executors, is highly improbable.

It ought not to be overlooked, in construing this will, that an entire plantation is more valuable as a whole, than the aggregate of all its parts would be if divided; and that the process of selling land so circumstanced, for the purpose of more equal distribution, is common in the country, the power being lodged with the county court, and with which all persons are familiar. The probability, therefore, is, that the testator was merely providing, by his will, for doing that which he knew would be done on application to the county court.

The principal difficulty which I have felt upon the subject, arises from the creation, by the testator, of a life estate in one-third part of the land in favor of his wife. In reality, however, this difficulty occurs in every case of intestacy where there is a dower interest, and the land is directed to be sold by the county court, either to make more equal distribution, or for the purpose of paying debts. In such cases, as in this, it must be sold subject to the dower of the widow, unless she consents to relinquish her interest; and in practice, no difficulty is ever found on this score. We think, therefore, that although the power to sell the lands is not as clearly given by the will to the executors as it is

desirable, in all cases, that it should be, it may be fairly inferred that such was the intention; as in no other mode could the manifest design of the testator be effectuated.

Adjudged cases are, in general, of but little use in expounding wills, further than to establish general principles as land marks. We have, however, looked into the books, and in our opinion. the cases analogous to this, sustain the view here taken.

In Bentham v. Wiltshire, [4 Madd. C. 44,] the testator directed land to be sold, without saying by whom, and without giving his executors the disposition of the proceeds. The court said, "to enable executors to sell, the power must be either expressly given to them, or necessarily to be implied from the produce being to pass through their hands in the execution of their office, as in the payment of debts and legacies; but here, the executors have nothing to do with the produce of the sale, nor any power of distribution with respect to it;" and upon this ground, it was determined the executor had no power to sell. In Patton v. Randall, [1 Jac. & W. 189,] the same decision was made upon a similar state of facts. But in Tylden v. Hyde, [2 Sim. & St. 238,] where there was a general direction to sell land, and the product of the sale to be divided by the executor among certain persons, the vice chancellor held, "that where there was a general direction to sell, but it is not stated by whom the sale is to be made, then, if the produce of the sale is to be applied by the executors in the execution of their office, a power to sell will be implied to the executors."

The principle to be extracted from these cases, is the one which must govern this. In them, it is true, there was an express direction to sell, and the question before the court was, who was to execute the power. In this case, the intention that the land should be sold, though not expressly declared, is plainly inferrible from the whole will; and when so ascertained, it must exert the same influence as if put down in express words. When, therefore, it is ascertained, that the land is to be sold for the purpose of distribution, and that this distribution is to be made by the executors, their power to sell necessarily follows; as otherwise they could not execute the trust. This is the precise point decided in the case last cited, of Tylden v. Hyde.

It does not militate against the view here taken, that the portion of Mrs. Washington is to vest in trustees for her benefit—

the money will be trust property precisely as the land would have been had it been given to trustees for her benefit.

This bill is not filed for a specific performance: its object is to obtain a rescission of the contract, because it was supposed the executors, having no power to sell, could not make a valid title. This we have shown to be a mistake; and as we cannot assume that the executors will refuse to make title, we can perceive no reason for retaining the bill.

Having attained the same conclusion as the chancellor, though by a different process, his decree, dismissing the bill, must be affirmed; but as the question was one upon which doubts might not unreasonably be entertained, each party will pay his own costs.

HILLIARD, BY NEXT FRIEND, v. CARR AND KETCHUM.

1. No objection will be allowed in an appellate court to the complaint in a proceeding for an unlawful detainer, which was not made before the justice of the peace, if it is not so defective in substance that no judgment can be rendered for any particular premises.
2. Where the notice to relinquish the possession previous to exhibiting the complaint for an unlawful detainer, was given by the attorney at law of an infant, in the absence of any thing appearing to the contrary, it will be intended on error, that he was employed by the guardian or next friend of the infant.
3. As it is a matter within the discretion of the court trying a cause, to grant or refuse a new trial, the refusal to grant it, on the ground that the motion therefor, was not made in due time, is not revisable *on error*.
4. The act of 1840 "To provide a more perfect remedy in cases of unlawful detainer in the city of Mobile," provides, that if the judgment of the justice of the peace in such case be reversed, by the circuit court, there shall be a trial *de novo* by jury in that court, &c.: *Held*, that on an appeal or writ of error to the supreme court, it will be allowable to assign errors in the record, arising previous to the judgment of reversal.

WRIT of error to the Circuit Court of Mobile.

This was a proceeding for an unlawful detainer, commenced

and tried before a justice of the peace. The complainant represents that the plaintiff in error was in possession for a certain period, (which is stated.) by the defendants as his tenants at will, of certain premises situate in the city of Mobile, and described as follows, viz: "Bounded west by Water street, on which it fronts one hundred feet, south by Walker's cotton press, (so called,) east by the channel of the river, and having the same width front as in the rear, being the premises commonly known as the Hilliard or Bebee property." It is further stated, that the petitioner has an estate in the premises by a judgment at law in an ejectment, upon an unsatisfied mortgage, which still remains forfeited." Further, that the defendants unlawfully detain the possession of the premises from your petitioner, after due notice to relinquish the same to him, &c."

The defendants appeared and pleaded, "not guilty," and on an issue thereto, the cause was tried. On the trial, the plaintiff offered a notice to the defendants in evidence, which is in these words: "Gentlemen, you are required forthwith to relinquish possession of the premises now by you occupied, described as follows, to wit, the lot or parcel of land lying east of Water street, and next north of Walker's cotton press, having about one hundred feet width on that street, and extending with the same width eastwardly, to the channel of the river, including a wharf, the premises being the same commonly denominated the Hilliard or Bebee property.

"I remain, gentlemen, respectfully J. F. Adams, attorney at law, and agent for George Hamilton Hilliard, proprietor of the premises."

To the admission of the notice, the defendants objected, on the ground that it was insufficient; but their objection was overruled, and thereupon they excepted. They then moved the court to charge the jury that the notice was not such as the defendants were bound to regard, and by holding over after its receipt, they were not guilty of an unlawful detainer. Whereupon the court charged the jury, that the notice was a sufficient demand of the possession, and the defendants again excepted. The jury returned a verdict for the plaintiff, and a judgment was thereupon rendered in his favor for the recovery of the premises described in the complaint, besides his costs, &c.

It is shown by the proceedings before the justice of the peace,

that the cause was tried on a Saturday in January, 1842, the verdict returned, and the court adjourned *sine die*. On the Monday following, before the justice had written out and signed judgment, the defendants moved him for a new trial, on the ground that the verdict of the jury was contrary to the law and evidence: after due consideration, the motion was overruled—the justice being of opinion that he had not the power by law to grant a new trial at the time when it was asked.

The proceedings before the justice were removed by *certiorari* to the circuit court, where it was assigned for error: 1. That the complaint was insufficient to sustain the action or the judgment. 2. That the justice erred in the matters stated in the bill of exceptions: And 3. In the refusal to grant a new trial. The court adjudged that the third assignment was well taken and for that cause reversed the judgment of the justice; and thereupon proceeded to the trial of the cause *de novo* by a jury at the bar of the court. On that trial a verdict was found for the defendants, and a judgment was thereupon rendered against the plaintiff for costs.

Among other errors assigned are, 1. The reversal of the judgment of the justice of the peace. 2 The reversal of that judgment and awarding a trial *de novo*.

Adams and Peck, for the plaintiff in error.

Campbell and Dargan, for the defendants.

COLLIER, C. J.—As the parties went to trial before the justice of the peace, without objection on the part of the defendants to the complaint, this court will not now inquire whether it is defective in point of form; but if it be so much wanting in substance that no judgment can be rendered for any particular premises, it will be allowable for a revising court to consider its defects. Such is the decision in Wright v. Lyle, [4 Ala. Rep. 112,] yet the court in that case were of opinion, that if the verdict and judgment contained such a description of the premises as to identify them with reasonable certainty, so as to enable the officer to execute the writ of possession without danger of trespassing on the rights of others, the insufficiency of the complaint would be unavailable, unless it had been objected in the primary court. In the present case, no exception was taken before the justice to the form of the

proceedings, but an issue was made up and the cause submitted to the jury, with the assent of both parties. The complaint describes the premises with such certainty as to make their identification a matter of no difficulty—it also alleges the possession of the plaintiff, the tenancy at will of the defendants—the demand of possession, and unlawful detainer by them. These allegations it is believed, make it sufficient in point of substance.

In respect to the notice for the delivery of the possession of the land in question, the act of February, 1840, "to provide a more perfect remedy in cases of unlawful detainer, in the city of Mobile," enacts that the "landlord or landlords, lessor or lessors, or the person to whom the remainder or reversion, &c. shall belong, his or their agent, or attorney," shall give the same. It is not denied that an attorney at law is authorized to give the notice, but it is insisted, that as the plaintiff was an infant, he was not competent to appoint an agent or attorney, to act for him. Conceding this to be the law, and yet it cannot be assumed as a legal conclusion, that the direct appointment of the plaintiff was the only authority under which the attorney represented his interest. The reasonable inference in the absence of extrinsic proof, showing the contrary, is, that the attorney was retained by the guardian or next friend, and this presumption acquires increased strength from the fact, that the same attorney made the complaint, and conducted the proceedings on the part of the plaintiff before the justice. That it was competent for the defendants to have controverted by proof, the authority of the attorney to represent the plaintiff, is not denied by us, but this is a point not now necessary to be considered.

In Bridges & Beers v. Miller, [3 Ala. Rep. 746,] it was decided that the granting or refusing a new trial, was a matter within the discretion of the court trying the cause; and however determined, cannot be revised on appeal or writ of error. And further, the refusal to decide upon such a motion, is no objection to a judgment otherwise regular; for as the appellate court cannot examine into its merits, and ascertain whether it should have been granted—it cannot undertake to say that the party complaining has been prejudiced by refusing to decide upon his application for a new trial. This is a conclusive authority to show that the circuit court should not have reversed the judgment of the justice, for the refusal to order a new trial; and whether the

reason of the justice for the decision which he made, was well founded or no, is a question wholly immaterial.

The fifth section of the act cited, provides, if the judgment rendered by the justice on the trial of an unlawful detainer be reversed, the cause shall be tried *de novo;* and the court shall instruct the jury, if they find a verdict for the defendant, to assess the damages sustained by the defendant in consequence of the issuance of the writ of restitution; and shall give judgment against the complainant and his securities for the amount of the damages, as well as award a writ of possession in favor of the defendant.—It is insisted by the defendants, that when the judgment is reversed, and a trial by jury is had in the circuit court, a writ of error after the cause is thus disposed of, will not authorise a revision of any point arising previous and up to the time of reversal. This argument, it is believed, cannot be maintained. If the judgment was improperly reversed, the order for a trial was irregular, and in point of law, unauthorised; and the effect, unless it could be corrected, would be to divest a right which had been ascertained by the legal judgment of a competent court. It may be well questioned whether the plaintiff in this case could, after reversal had been announced, arrest a trial *de novo*, in order to sue a writ of error, or take an appeal; the defendants themselves had rights to be affected by such a trial; and upon principle, it would seem, might have pressed it. Be this as it may, *the court appears to have ordered a trial*, and though the plaintiff appeared before the jury, the record does not show that he gave his assent to the action of the court. Under these circumstances, we cannot think that he is foreclosed as to all matters occurring previous to the trial.

We have said, that the judgment of the justice was improperly reversed. This being the case, it follows that the subsequent trial was irregular. The judgment of the circuit court is consequently reversed, and the cause remanded, that a *procedendo* may thence issue to the justice of the peace trying the cause, or his successor in office.

CUMMINGS' HEIRS, ET AL. v. GILL'S HEIRS.

1. When upon a sale of land by parol, a considerable part of the purchase money is paid, and the vendee let into possession, who makes improvements, a court of chancery will decree a specific performance, at the suit of the vendee against a creditor of the vendor, upon the payment of the residue of the purchase money.
2. Although it cannot be demanded as a right, the chancellor may, in his discretion, at any time before the decree, permit a formal amendment to be made to the bill. An amendment relating to the price alledged to be given for lands, when it can be considered a clerical mistake, is of that character.
3. No decree, except for costs, can be made in favor of a defendant upon his answer. If he seeks relief he must do it by a bill of his own.

ERROR to the Chancery Court at Talladega.

The bill was filed by the ancestor of defendants in error for the specific performance of a verbal contract for the sale of land. The bill alleges the purchase of a tract of land from the deceased, which is particularly described, at the price of $650; of which sum, $481 was paid down, and a credit given on the residue of one and two years. There was no written evidence of the contract. That he was let into immediate possession, and has held it ever since, having made valuable and lasting repairs to the property. That Cummings, the vendor, has departed this life, leaving a widow and six children, without having made title.

The bill further charges, that one McGehee has obtained judgments against Cummings, and levied them upon the lands so purchased by him; and prays a specific performance of the contract; and that the heirs of Cummings be decreed to make him a title, &c.

The defendant, McGehee, answers, and from information, denies the material allegations of the bill. The other answers need not be here stated.

Many depositions were taken on both sides, which are rendered unnecessary to be here stated by the opinion of the court.

Two of the depositions, those of T. Yeatman and M. Vice, were objected to at the hearing, because there was no notice on the files of the time and place of taking them; but they were ad-

mitted by the chancellor, because the commissioner certified that legal notice was given. He also admitted the deposition of the widow of the vendor, but did not consider it in his decision.

After the evidence had been heard, the chancellor permitted the complainants to amend the bill where it stated the amount of the purchase money in dispute, so as to make it correspond with the amount proved by the witnesses.

The chancellor, upon the proof, considered that the complainants were entitled to a specific performance, and decreed accordingly; and also decreed, that the balance of the purchase money, $216, be paid to the estate of Cummings.

From this decree, the defendant, McGehee, appealed to this court; and now assigns for error—

1. The court erred in not sustaining the demurrer to the bill.
2 In not dismissing the bill.
3. In admitting the depositions of Meredith Vice and Sarah Cummings.
4. In permitting the plaintiffs to amend their bill after publication.
5. In decreeing a specific performance.
6. In the decree made.

Wm. B. Martin, for plaintiff in error. The court certainly erred in the admission of the depositions of Vice and Yeatman, as there was no proof of notice; and in permitting an amendment of a material allegation of the bill after publication of the depositions, and whilst the cause was being heard. [3 J. C. R. 423; 4 id. 170, 368; Milford's R. 258.]

The court also erred in decreeing the purchase money unpaid to the estate of Cummings, when it should should have been decreed to McGehee, as it was shown that the estate of Cummings was insolvent.

Courts will not, at this day, allow new causes for taking contracts out of the statute of frnuds, and will not overstep the adjudged cases. [1 Bibb, 204; 3 id. 2; 2 Stewart, 21; 15 Johns. 503.]

Bowdon, *contra*. It is not important to consider whether the testimony objected to was or was not properly admitted, because

the testimony is ample without that evidence to establish the allegations of the bill.

The amendment of the bill, which the court permitted, was merely formal; and such amendment the chancellor may, in his discretion, allow after publication. [Story's Eq. Pl. 683; Clay's Dig. 351, sec. 37; 2 Bibb, 169; 1 Brack. 119; 3 Mumf. 477; 5 id. 308; Litt. S. C. 201; 6 Wend. 638; 2 P. Wms. 424; 12 Vesey 48, 174.] The view here taken does not conflict with the case in 3 Ala. Rep. 160.

Upon the merits of the case, he referred to 4 Bibb, 317; 4 Ala. 712; 1 J. C. R. 273, 149; 4 Porter, 297, 374; 14 Vesey, 386; 2 Strange, 783; 4 Blackfords, 383; 2 Story's Eq. 62, 75]

ORMOND, J.—Without considering the testimony of the witnesses, which were objected to, it appears from the other testimony in the cause, that upon a verbal contract for the sale of land, the vendor, upon the receipt of a large part of the purchase money, put the vendee in possession of the land, who has ever since retained it, and made improvements, &c. This has always been considered, in this State as well as elsewhere, such a part performance of the contract, as would take the case out of the influence of the statute of frauds, and authorize a court of chancery to decree a specific execution of the contract.

The permission granted by the chancellor to the complainant, to amend the bill after publication of the testimony, cannot be reviewed in this court. The amendment which the chancellor permitted, relating to the price to be given for the land, was not, it is true, a matter of right at that stage of the cause. It was at most, however, in the nature of an amendment of a clerical error, which the chancellor might permit to be made at any time before a decree was rendered.

There was no error in the court decreeing the residue of the purchase money to the heirs of the vendor. If the defendant, McGehee, set up any claim to money due from the estate of Gill to the estate of Cummings, he should have asserted his title to it by a cross bill. Upon the bill filed by Gill, no decree can be made in favor of McGehee. A defendant cannot, by answer, pray any thing but to be dismissed the court; if he has any relief

to pray, he must do so by a bill of his own. [Cullum v. Erwin, 4 Ala. 452.]

From this examination, it appears there is no error in the decree of the chancellor; and it is, therefore, affirmed.

COMMISSIONERS OF SECTION SIXTEEN, &c. v. CRISWELL.

1. C. agreed to teach the school of the township, and the commissioners agreed to furnish a comfortable house, &c., and remunerate him with the "available funds" for one year; C also stipulating "to pay five hundred dollars to support the female school, as an emolument for a tutoress." The agreement was dated 28th December, 1838; but did not provide when the school should be opened or closed: *Held*, 1. That C's contract required him to enter upon the performance of his engagement within a reasonable time after "a comfortable house" was furnished; or C. might provide a house for himself and relieve the commissioners from that duty. 2. That an allegation that C had taught a school for the year 1839, as his contract required, and the "available funds" for that year amounted, &c. was sufficient, without stating the precise day when he should have been paid. 3. That it was the duty of the commissioners to employ the "tutoress," and C. need not allege that he had paid or tendered the sum agreed, to pay one. 4. That by the "available funds for one year" were meant the profits derivable from the capital during that time, whether received or not by the commissioners before the end of that period.
2. Although the act of 1837 enacts that "The trustees of each school district, and where the township supports but one school, the commissioners shall have power to employ a teacher, &c.," yet a person employed by the commissioners need not allege or prove that there is but one school supported by the township; if the fact be otherwise, and it can avail the commissioners, they must show it.

WRIT of error to the Circuit Court of Sumter.

This was an action of assumpsit, at the suit of the defendant in error, on an agreement of the following tenor, viz:

"Jamestown. December 28, 1838.—This article witnesseth the agreement between E. Criswell, teacher, of the one part, who agrees to teach the school of township 13 and range 2, west, in all the usual branches taught in schools of liberal education; and

the commissioners of township and range above mentioned, of the other part, agree to furnish a comfortable house, (other small expenses being paid by the students,) and remunerate him with the available funds, for one year, of section 16, of township and range above mentioned, and the profits arising from an open school, of male and female, in township and range above mentioned. Further; the said E. Criswell agrees to pay five hundred dollars to support the said female school, as an emolument for a tutoress of said school.—In witness whereof, we, the said parties, hereunto affix our names."

Commissioners, { E. Criswell,
Lewis Houston.

We agree to the above article, with the exception of being bound individually for a school house.

B. B. Jones.
Henry Johnson."

The defendants demurred to each of the five counts of the declaration, separately. To the first four, it was objected, that they do not specify a time when the defendants were to perform their part of the agreement—whether on request, at a day certain, or in a reasonable time. To the entire declaration, it was objected, that the commissioners of a sixteenth section are a corporation of special and limited powers; and it is not shown, that in making the contract declared on, they acted in obedience to the charter. To the second count, in particular, it is insisted that the demurrer should have been sustained, because it does not allege a payment by the plaintiff of the five hundred dollars, as a compensation to a female instructor; that the general allegation of performance is bad, if for no other reason, because it does not aver that the plaintiff is still ready to pay. The demurrer was overruled, and the cause tried by a jury on the plea of *non assumpsit*, who returned a verdict for the plaintiff, for the sum of eight hundred and sixty-four 21-100 dollars, and a judgment was rendered accordingly.

On the trial, the defendants excepted to the ruling of the court. From the bill of exceptions, it appears that the plaintiff introduced as evidence the agreement set out above, and proved by the cashier and a clerk in the State bank, that the amount of dividend, declared in 1839, on the amount of principal which had been paid into the bank, to the credit of the defendants as a cor-

poration, was four hundred and sixty-seven 30-100 dollars. *Further;* on the 17th of November of that year, there became due to the plaintiff a note for four thousand one hundred and ten dollars, on which there was interest for three years, amounting to seven hundred and thirty-nine 80-100 dollars. This note was paid on the 6th Februaay, 1840.

The plaintiff also adduced evidence tending to show, that the defendants never furnished a house, but there was no proof that he ever demanded one, though it appeared he taught in a house provided by himself. It was admitted that plaintiff never paid or tendered five hundred dollars to compensate a teacher. No proof was offered, to show that the township had been laid off in school districts, or that at the time the agreement was made, more than one school was taught within the same.

Upon this evidence, the court charged the jury, substantially, as follows:

1. The contract did not impose any obligation upon the plaintiff to employ a tutoress for the school.

2. The stipulation of the plaintiff to pay five hundred dollars to compensate a teacher. did not oblige him to pay that sum as a condition precedent, to his right to recover of the defendants.

3. That to show the validity of the agreement made by defendants, it was not incumbent upon the plaintiff to prove that there was but one school in the township.

4. The interest due on the note of four thousand one hundred and ten dollars, was available funds of the defendants within the meaning of the contract for the year for which the plaintiff was employed to teach a school.

Bliss & Baldwin, for the plaintiffs in error—

1. In the nature of the case, the defendants were not bound to pay the plaintiff presently; and the declaration is defective in not making some specific averment on the point. Where an agreement does not specify the time for its performance, it should be averred that it was to be done on request, or in a reasonable time; and that such request was made, or a reasonable time had elapsed. [1 Phil. Ev. 151; Lawes on Plead. 99, 107; Dane's Ab. ch. 175, § 33; Clarke v. Gray, et al. 564; Osborne v. Lawrence, 9 Wend. Rep. 135.]

2. The trustees of a sixteenth section have the power to em-

ploy teachers generally; but it is only where the section supports but *one school*, that the commissioners possess such power; to make the contract binding on the corporation, the plaintiff should have shown that the commissioners were authorized to make it. [5 Porter's Rep. 169; Clay's Dig. 521, § 11—523, § 15.] And the declaration should have alleged the facts specially.

3. The consideration for the defendants' promise was the teaching of the school by the plaintiff for twelve months; and the payment of five hundred dollars as "an emolument for a tutoress;" and the declaration should allege that the plaintiff had done, or had offered to do both, and was still ready to pay the five hundred dollars. [1 Chitty's Plead. 317–8; 1 Saund. Plead. & Ev. 129; 2 Johns. Rep. 433; 6 Monr. Rep. 325; 4 Lit. Rep. 137.]

4. It was incumbent upon the plaintiff to have had a female school taught: having failed to do this, he is not entitled to recover; for no one can tell how to apportion the damages. [1 Chitty's Plead. 312–3–4–5; 1 Porter's Rep. 437; 7 id. 133.]

5. The interest on the note for four thousand one hundred and ten dollars, was for three years preceding the 17th Nov. 1839, was not paid until the 6th February, 1840, and, consequently, could not be considered as the available funds for the year during which the plaintiff was employed. [Aik. Dig. 379, § 38; Clay's Dig. 526, § 24.]

6. It should have been alleged in the declaration, and proved, that there was but one school in the township; especially was such proof necessary, under the fifth count, for work and labor done, &c.

Peck, for the defendants.—

1. The contract of defendants was to furnish a house and to pay the available funds of township for the year 1839, during which the plaintiff was to teach; the breach assigned is, that the defendants did not furnish the house and pay the funds which were realized for that year. This, it is apprehended, is sufficient; for the money cannot be demanded until the expiration of the period when the service should have been performed.

2. It is inferable from the contract, that but one school was taught in the township at the expense of its funds; but if the reverse is true, it should be shown as a matter of defence.

3. The plaintiff was neither bound nor authorized to employ a

tutoress; and, consequently, the declaration need not allege that he had paid, or had offered, and was still ready to pay, the five hundred dollars. Such an allegation would only have been necessary in the event that the defendants had furnished the house and employed a female teacher.

4. The available funds of the township for the year 1839, were not the funds which the commissioners might have on hand during that year; for this would, perhaps, have diminished its principal. It means the entire interest which would accrue and become payable for that year whether paid or not; and the intention of both parties would be defeated, if the plaintiff was not permitted to recover the interest which became due in November, 1839, merely because it was not paid until February, 1840.

COLLIER, C. J.—1. The written contract between the parties is exceedingly inartificial. It does not provide in express terms, when the school which the plaintiff proposed to teach, should be opened or closed; but the commissioners of the sixteenth section agree to remunerate him with its "available funds," for one year. The fair inference from this, is, that he was to render service for that period, and that he was to enter upon the performance of his engagement within a reasonable time after "a comfortable house" was furnished; or if the plaintiff thought proper, he might relieve the commissioners from that stipulation in their contract, and provide a house for himself.

The declaration sets out substantially, the contract, alleges that the plaintiff taught a school for the year one thousand eight hundred and thirty-nine, as by its terms he had undertaken to do; that the available funds of the section amounted to a large sum in that year, to wit, &c.—all or any part of which the defendant had refused and failed to pay him. On the 27th February, 1840, the action was commenced. Now, although it is not expressly alleged at what time the plaintiff became entitled to remuneration, we think it clear, that as the contract is silent upon the point, it must according to reason and analogy be intended, that he was to be paid whenever the service was rendered. We have seen that the allegation of performance by the plaintiff is sufficient; the more especially as the action was not commenced until sometime after he was entitled to demand payment. The declaration, while it omits to state the precise day on which the

"available funds" should have been paid, clearly shows that they are claimed as due at the expiration of the year, when the school was taught. This allegation conforms in substance to the law which governs the contract, and the objection that the declaration is too vague, cannot be supported.

2. & 6. The fifteenth section of the act of 1837, "to revise and amend the laws in relation to schools and school lands," [Clay's Dig. 523,] provides that "the trustees of each school district, and where the township supports but one school, the commissioners shall have power to employ a teacher or teachers, on such terms as they may deem expedient." Under this statute it is insisted, that it is incumbent upon the plaintiff to show, that there is no more than one school in the township, as it is only in that event the commissioners have the power to employ a teacher. The fallacy of this argument is made apparent by its statement. According to all analogy, the contract is *prima facie* valid, and if there be an available objection to it, it must be made by the defendant.

3 & 4. A just construction of the contract did not impose upon the plaintiff the duty of employing a "tutoress," or oblige him to tender, at least without solicitation, "five hundred dollars as an emolument" for her services. The section of the act, 1837, above cited, provides, that "no teacher shall be employed, until he shall have been duly examined by the commissioners of the township, and shall produce their certificate of his qualifications and good character." This provision shows what is the duty of the commissioners in respect to the matter to which it relates, and is inconsistent with the idea that a power of employing teachers for the section, should be exercised by a third person, under a contract for that purpose. But if the statute was placed out of view, the terms of the contract do not authorise the conclusion, that the plaintiff was bound to perform that service for the commissioners. By prescribing the sum to be appropriated to the payment of a "tutoress," and the language in which that stipulation is expressed, the inference is clear, that the commissioners themselves should select a female teacher. If it had been intended otherwise, would not the plaintiff have been required to employ an instructress of prescribed qualifications, or one whose aptitude for the station should be judged of by the commissioners, &c? The salary to be paid her, would in such case be a matter of no con-

cern to the commissioners; they would have had a regard to qualification rather than the compensation allowed. But if they were to employ the "tutoress," then the agreement need only to have provided as it does for the payment of a sum *in numero.*

5. If the interest for three years upon the note for four thousand one hundred and ten dollars. had become *due and payable* in 1837–8–9, then it might admit of serious question, whether the interest for the two first years would constitute a part of the "available funds" of the defendant, within the meaning of the contract. But such is not the state of fact. We infer that the note was perhaps given for the third instalment due upon the purchase of the section; as the law directs that sixteenth sections shall be sold on a credit of one, two, three and four years, with interest at the rate of six per cent. *per annum*; and that notes with two or more good securities, approved by the commissioners, shall be given payable to the president and directors of the bank of the State or either of its branches. [Clay's Dig 525, § 21.] The note, according to the proof, matured in November, 1839, and then the interest, though it had been accumulating for several years, became available for the first time.

The fact that the amount of the note and interest was not paid into the bank until after the close of the year 1839, cannot affect the plaintiff's right to the interest. The word "available," is not to be understood in a strictly literal sense, but in that sense, in which the parties used it. If the entire capital stock of the section had become available during that year, the plaintiff would have acquired no claim to it; for the statute which provides for the sale of sixteenth sections, and the investment of the proceeds, expressly declares that the commissioners shall not diminish it.—[Clay's Dig. 526, § 24.] By the "available funds for one year," we are to understand the profits derivable from the capital during that time; whether it was actually received by the commissioners before the close of the year or not. Upon any other construction, there would be no certainty in the sum to be paid or received; and the contract would be just such as neither party could judiciously or prudently have entered into.

This view is decisive of the case, and the judgment must be affirmed.

SAWYER v. BRADFORD, Assignee.

1. A direction by the plaintiff to the sheriff to stay proceedings upon an execution against the principal debtor, without consideration, does not release the surety from the payment of the debt.
2. When a judgment is obtained upon an assigned note, the note has lost its negotiable quality, and cannot again be assigned, so as to enable the assignee to sue in his own name.

Error to the Circuit Court of Shelby.

Assumpsit in the court below, by the defendant in error, as assignee of a promissory note made by one Drury Sawyer, and the plaintiff in error as his surety, payable to one Robert C. Wilson. The declaration is in the usual form on the note.

The defendant pleaded, 1. Non-assumpsit. 2. Payment.—3. That one John Patterson, as assignee of Wilson, the payee in the note, at the July term, 1839, of Talladega county court, recovered a judgment on the promissory note now sued on, against D. Sawyer—that the defendant was merely the surety of D. Sawyer, and that after the rendition of the judgment against him, and whilst it was in full force and effect, and an execution which issued thereon, was in the hands of the sheriff, the plaintiff who had the entire interest in the judgment, caused and directed the execution to be stayed, whereby the sheriff was hindered and prevented from making the money on said execution, and avers that, but for the interference of the plaintiff in staying the execution, the money could and would have been made by the sheriff, &c.

4. That the promissory note now sued on, was on the — day of May, 1838, assigned by Wilson, the payee to one John Paterson, who as such assignee, at the July term, 1839, of the county court of Talladega, recovered a judgment against D. Sawyer, the principal in the note, and that said judgment remains in full force, not reversed, &c.—wherefore, &c.

The plaintiff demurred to the third and fourth pleas, and his demurrer was sustained.

Upon the trial on the issues of fact, the defendant offered evi-

dence of the facts stated in the third and fourth pleas, which on motion, the court excluded, and to which he excepted.

The assignments of error are, that the court erred in sustaining the demurrer to the pleas, and in rejecting the evidence offered by the defendant.

PECK & CLARKE, for plaintiff in error—contended, 1. That as the plaintiff in error was a mere surety, the staying of the execution and preventing the sheriff from making the money of the principal in the note, as stated in the third plea, discharged the surety from all responsibility. [3 Ala. Rep. 339; 9 Dana, 22.]

2. That the note having been regularly assigned to Patterson, and judgment recovered thereon by him, its negotiable quality became extinct, and that no suit could afterwards be maintained thereon in the name of the defendant in error. [4 Ala. Reports, 282.]

BOWDON, for defendant in error. The third plea is bad, because it does not aver that any *liens* were discharged, or that any notice, written or verbal, was given to the principal by the surety, to proceed and make the money, nor that Bradford entered into an agreement, on sufficient consideration, with the principal debtor for a stay of execution. Mere delay is not of itself sufficient to discharge the surety. [3 Stewart, 9; 12 Wheaton, 554; 3 Ala. 335; 15 Johns. 433; 17 id. 176; 8 Pick. 458; 1 Mumford, 269.]

The 4th plea merely questions the assignment set out in the declaration, and not being sworn to as the statute requires, is bad.

The evidence was properly excluded, if for no other reason, because it was inadmissable under the general issue.

ORMOND, J.—The same questions are presented upon the demurrer to the pleas, and upon the bill of exceptions; we shall, therefore, decide upon the legal effect of the facts, without reference to the frame of the pleas.

The facts set out in the third plea, constitute no defence to the action. The direction to the sheriff to stay the execution, was without consideration, and might have been countermanded at any time. It did not, therefore, interpose any obstacle to the

payment of the debt by the surety, when he could have proceeded against his principal.

We understand the defence set up in the fourth plea to be, that after a judgment by Patterson as assignee of Wilson, the payee, against D. Sawyer, the principal, the note was assigned by Wilson to the defendant in error, who again put the note in suit against the plaintiff in error, the other party to the note not sued in the first action. In Brown v. Foster, [3 Ala. 284,] we held, that by the judgment in favor of the first assignee, the note had lost its negotiable quality, and could not be again transferred, so as to enable the transferee to sue in his own name. That decision is decisive of the present case, and the judgment must, therefore, be reversed, and the cause will be remanded, if desired.

CRAWFORD v. THE BRANCH BANK AT DECATUR.

1. Where a bill drawn in this State is payable abroad, if dishonored either by non-acceptance or non-payment, the drawer is liable to pay interest according to the laws of this State
2. A judgment in a summary proceeding at the suit of a bank against the drawer of a bill of exchange, is sufficiently certain, which states that the bill was presented for payment at "maturity," without specifying the day.
3. The notarial fees attending the protest of a bill of exchange, are chargeable upon the drawer; but to authorize a judgment for these fees where a bill is payable and protested abroad, the legal charge for this service should be proved.
4. Where a judgment by default is rendered against the drawer of a bill of exchange payable in another State, which includes the charge of protest, without any proof of what the law authorizes therefor, the judgment is not reversible, but will be amended as for a clerical misprision under the act of 1824, by excluding the notarial fees.

Writ of error to the County Court of Morgan.

This was a summary proceeding by notice and motion under the statute at the suit of the defendant in error against the plaintiff. A judgment by default was rendered in favor of the plain-

tiff. The entry recites, that a judgment was moved for against the defendant as the drawer of a bill of exchange, for the sum of five thousand dollars, drawn on Sandidge & Dickerson at Mobile, dated at St. Stephens the 20th of May, 1840, payable eight months after date, to the order of P. T. Harris, at the Citizens' Bank of Louisiana, in New-Orleans, indorsed by the payee to James Magoffin, and by the latter to the plaintiff. *Further*, it is stated, that at its maturity, the bill was presented for payment at the place designated on its face, which being refused, the same was protested, and due notice thereof given to the defendant. It is also alleged that the plaintiff produced and showed to the court the certificate of the President of the Branch Bank, that the debt in question is really and *bona fide* its property. Then follows a recital of the fact, that thirty days notice of the motion had been given to the defendant—his default, with a judgment for the amount of the bill, with interest and damages, together with "the sum of seven dollars, the protesting fee, also the costs of the motion."

Mr Crawford, *pro. se.* submitted an argument in writing, in which he made the following points:

1. Interest should have been calculated on the bill according to the laws of Louisiana, where it was payable, and the amount ascertained by the verdict of a jury. To sustain this conclusion, he cited the written argument which he filed at the last term, in Crawford v. The State Bank.

2. The judgment entry should have stated the precise day on which the bill was presented at the Citizens' Bank of Louisiana for payment; the time of its "maturity" is a legal question, and cannot be concluded without stating the precise day.

3. It was not shown what fee the notary public was entitled to, for protesting the bill, and the court could not, without proof, have assumed that seven dollars was a proper charge, or that the plaintiff had paid any thing. [Clay's Dig. 325, § 70.]

To sustain the second point, he cited Logwood v. the Huntsville Bank, [Minor's Rep. 23;] Bates v. The P. and M. Bank, [8 Porter's Rep. 101.]

J. A. Nooe, for the defendant.—As to the first point, he relied upon Crawford v. The State Bank at this term. On the the se-

cond, he cited Taylor v. Branch, [1 Stew't & P. Rep. 249;] Bates v. P. & M. Bank, [8 Porter's Rep. 99;] and insisted that the third, if well taken, showed a mere clerical misprision, amendable at the costs of the plaintiffs in error, under the act of 1824.

COLLIER, C. J.—1. The case of Crawford v. The State Bank at this term, decided that where one draws a bill in Alabama, addressed to a drawee in the District of Columbia, requesting him to pay it there, if the drawer is sued either upon the non-acceptance or non-payment of the drawee, he will be liable to pay interest according to the laws of this State: for as to him, this is the *lex loci contractus.* That case is directly in point, and shows that the defendant was chargeable with the rate of interest prescribed in this State; to ascertain the aggregate amount of which, the clerk of the county court was competent. [See Clay's Dig. 325, § 70.]

2. To sustain the second objection made by the plaintiff in error to the judgment of the county court, the case of Logwood and others v. The Huntsville Bank, [Minor's Rep. 23,] has been cited. There, the judgment entry recited, that the defendants had "been duly noticed of this motion," &c., while the charter of the Bank required that ten days notice should be given: *Further*, it did not state that the certificate of the President of the Bank was produced in court as required by law. The court held that, "in proceedings, according to the course of the common law, many defects in the record, will after judgment, be cured by the doctrine of intendment. But wherever a summary remedy is given by statute, those who wish to avail themselves of it, must be confined strictly to its provisions, and shall take nothing by intendment. The supervising court cannot infer that notice as required by law, has been given, unless it so appears in the record. Not to require this, would be to surrender to the court below, the power of judging without appeal, of all the proceedings had before it." In Bates v. The Planters' and Merchants' Bank, [8 Porter's Rep. 99,] this court recognizes the case cited as authoritative, for the reason that the ten days notice, and the production of the certificate as required by the charter, are indispensable to the exercise of the summary jurisdiction which it confers. But it never has been considered necessary in such cases, that in respect to other recitals or statements, the judgment entry

should be drawn with greater certainty and particularity than a declaration founded on the same cause of action. It cannot be pretended that the objection we are considering, in any manner affects the summary jurisdiction of the county court, and we will therefore inquire, if an allegation in a declaration, that the bill was presented at maturity, without stating the precise day, would be good.

In Bynner v. Russell, [1 Bing. Rep. 23,] the declaration, after alleging a delivery of the bill to the plaintiff, proceeded thus, "afterwards, and when the said bill of exchange became due and payable, according to the tenor and effect, to wit, on the 31st day of March, in the year 1822, to wit, at London, &c. the said bill of exchange was in due manner, and according to the usage and custom of merchants, presented and shown" for payment. The defendant demurred specially, because the 31st of March, mentioned in the declaration, was a Sunday, and the bill should have been presented on the preceding day. *But the court held*, that the day was immaterial, being specified under a *scilicet*, and in an averment that the bill was presented when it became due and payable. [See, also, Chitty on Bills, 590, 9 Am. ed. and note h; 1 Saund. on P. & Ev. 264.]

In Brown & Son v. Hall, [2 A. K. Marsh. Rep. 599,] the declaration alleged, that the bill was duly presented to the drawees for payment, "to wit, on the 15th of December, 1817, at, &c. A judgment by default was rendered, and the cause removed to the court of appeals, where it was said, that after such a judgment, the material and traversable allegations of the declarations must be taken to be true, but the days alleged, when the bill was presented, and the notice of protest given, are not of the latter character. *Further*, had the defendants pleaded, under the averment, that the bill was *duly presented*, it would have been competent for the plaintiffs to show that notice of the protest was given in due time, although this might be on a day different from that alleged. So, where the declaration alleged, that "when the bill became due and payable, according to the tenor and effect thereof, to wit, on the 27th December," &c. "it was presented for payment, &c." *The court held*, that as it was averred that the bill was presented when it became due and payable, according to its tenor and effect, and the date of the presentment was stated under a *scilicet*, it was allowable to show a presentation on the 26th

of March, which was the third day of grace. [Jackson's Adm'x v. Henderson, &c. 3 Leigh's R. 196.] This latter case cites with approbation, Bynner v. Russell, *ut supra.* In fact, all the citations made on this point, consider it quite sufficient to allege a due presentment in general terms, without particularizing a day. The statement in the present case, that the bill was presented *at maturity*, is quite as precise, and in fact equivalent to the terms *duly presented*, or *according to its tenor and effect.* [See, also, Crawford v. Camfield at this term; Taylor v. Branch, 1 Stewart & P. Rep. 249.] This being the case, it follows that the generality of the recital in the judgment does not affect its regularity.

3. That the notarial fees attending the protest of a bill of exchange, are a just charge upon the drawer, is indisputable. [Chitty on Bills, 666, a. and note (1) 9th Am. ed.] The objection in the present case is not, that the defendant below was not chargeable with this expense, but that it was assumed to be a specific sum without proof. To have authorized the judgment in this respect, there should have been evidence to show what fees were allowable for such service, by the law of Louisiana; this being shown, the presumption would arise upon the production of the protest, that the holder of the bill had paid the expence. But the inclusion of this fee in the judgment, is not an error which authorises its reversal. The act of 1824, declares that "no cause shall be reversed by the supreme court or any circuit court, for any miscalculation of interest, or other clerical misprision in entering judgment, so as to give costs to the plaintiff in error; but in all such cases, the supreme court may order the judgment to be amended at the costs of the plaintiff in error." [Clay's Dig. 322, § 54.] This objection is nothing more than a clerical misprision in entering a judgment which the court had ordered to be rendered upon the bill—it was amendable on motion, by the county court; and must consequently be here corrected at the costs of the plaintiff in error. In other respects, the judgment is unobjectionable.

THOMPSON v. STICKNEY.

1. An agent acting for a known principal, and receiving money in that character, is not individually responsible if the money has been paid over to his principal without notice. Therefore, when a county clerk collects money by order of the commissioners' court, he cannot refuse to pay it over to the county treasurer, although it has been illegally assessed, unles it had been previously demanded of him by those from whom it was received.
2. A mere verbal direction by the commissioners' court to the county clerk to collect thirty per *centum* on licenses, for county purposes, is not the imposition of a tax, nor does it invest the clerk with legal authority to receive the money.
3. A license issued by the clerk of a county court, the tax upon which is required by the general law to be paid into the State treasury, must be so paid in, although the clerk, at the time he issued the license and received the money, did not know of the passage of the State law, and supposed he was acting under an order of the commissioners' court.

ERROR to the Circuit Court of Mobile.

This was a motion, by the county treasurer against the clerk of the county court, for moneys of the county alleged to be in his hands. The following facts were agreed:

It is admitted, that the defendant, as clerk of the county court of Mobile, after the passage of the general revenue law in February last, issued fifty-three licenses to persons of the county of Mobile, at thirty dollars each, which was done according to the law existing before the passage of that act, and under an assessment made in writing by the judge of the county court, and delivered to the clerk, under the old law before the passage of the act of February last. After the promulgation of that act, the members of the commissioners' court of roads and revenue, at their regular term, verbally instructed the clerk to receive thirty per cent. upon the tax assessed in the revenue act for county purposes; but no order or resolution in writing was made, and none exists on the minutes of that court. Under this verbal order, the clerk has issued seventeen licenses, receiving the thirty per cent. on the State tax on each license, and has the money.

Upon these facts, the court rendered judgment against the clerk in favor of the county treasurer; from which this writ is prosecuted.

CAMPBELL, for plaintiff in error.
GIBBON, *contra.*

ORMOND, J.—It is a general rule of law, that an agent, acting for a known principal, and receiving money in that character, is not individually responsible if the money has been paid over to his principal without notice. That revenue officers or tax collectors form no exception to this rule, is shown by the case of Greenway v. Hurd, [4 Term, 553.]

As it respects the fifty-three licenses, issued after the passage of the revenue law of February, 1843, the proposition above stated has no application. The revenue act of February, 1843, had declared that the licenses which the county clerk issued, should be a State tax. [See the 7th section of the act.] The act operated from its passage, and it can make no difference that the clerk, at the time he received the money, did not know that the law had passed. He is the proper person to issue the license, and receive the money; and is required by law to pay the money over to the collector for the purpose of being paid into the State treasury. [Clay's Dig. 571, § 75, 76.] For the amount, therefore, received on the fifty-three licenses, he is not responsible to the county treasurer.

The sum received on the seventeen licenses, by the verbal direction of the commissioner's court, stands upon a different footing; and to that, the law laid down at the commencement of this opinion, does apply.

The 15th section of the revenue act of February last, authorizes the commissioners' court to levy a tax, for county purposes, on the subjects of State taxation, not to exceed thirty *per centum* on the amount. It cannot be pretended, that the mere verbal direction of the court to the clerk to collect thirty *per centum* on licenses issued by him for county purposes, is the *levy* of a tax. The amount to be assessed is discretionary with the court; and until the amount to be demanded on the State tax is recorded on the minutes of the court, the tax is not *levied*, and there is no warrant in law for exacting it from the citizen. But although collected without legal authority, it was received by the clerk in virtue of power derived from the commissioners' court; and as it does not appear to have been demanded from him by those from

whom it was received, he cannot refuse to pay it over to his principal, by whose authority he received it.

It results from the view here taken, that the court below erred in its judgment, that the entire amount could be recovered by the county treasurer; and its judgment is, therefore, reversed, and the cause remanded.

HARTWELL AND WILKINS v. BLOCKER.

1. A bill in equity must be certain, to a common intent, in respect to the case intended to be made by it, and the allegations in aid thereof; and if one who is not the mortgagee, files a bill for the foreclosure of a mortgage intended to secure several promissory notes payable to different persons, he must distinctly state that he is the assignee of all or such of the notes as he claimed, so that his right to sue, and the character in which he sues, may be seen.
2. Where the maker of promissory notes, payable to his own order, executes a mortgage to a third person to secure their payment, he thereby admits that they are valid securities for the payment of money in the hands of the mortgagee, whether regularly indorsed or not.
3. Where a mortgage is executed to secure notes falling due at different periods, if a bill is filed by the holder of the last that matures, it should be stated whether those first payable were unsatisfied, and their proprietors made parties, if known.
4. *Semble :* where a bill is defective for uncertainty, but the objection was not made in the primary court, an appellate court, in reversing the decree, will direct each party to pay his own costs.

WRIT of error to the Court of Chancery sitting at Mobile.

On the 27th of February, 1843, the defendant in error filed his bill, setting forth that on the eighteenth of August, 1836, Eleazer Hartwell and John Hartwell were indebted to Abner S. Lipscomb and George W. Owen, since deceased, in the sum of sixteen hundred and five dollars, by six promissory notes, (particularly described,) for different sums, payable at different times at the Planters' and Merchants' Bank of Mobile. In order to secure the payment of these several notes, Eleazar and John Hartwell

conveyed five tracts of land situate in Mobile county, containing ten acres each; conditioned that the same should be void if the notes should be paid according to their tenor and effect. The bill alleges, that the notes are due and unpaid; and recites, that the complainant is the assignee of Abner S. Lipscomb and Louisa S. Owen, the administratrix of George W. Owen, deceased; and that Eleazar Hartwell, by deed bearing date the 26th of July, 1838, conveyed his interest in the lands in question to John Hartwell.

John Hartwell and Josiah Wilkins, who, it is alleged, holds under him, are made defendants. The bill concludes with a prayer that an account may be taken, the equity of redemption in the mortgaged premises foreclosed, and the lands sold, &c. Further, that process of subpoena may issue, &c.

Subpoena issued on the 1st March, 1843, was executed on Wilkins on the 2d, and on Hartwell on the 3d of the same month; and on 4th of April thereafter, a decree *pro confesso* was entered against the defendants. Thereupon, the notes and mortgage, being produced and proved to the court, were, with the bill, referred to the master to ascertain the amount due and owing to the complainant; and report accordingly at the then term of the court. The master reported, "that on examination of the mortgage, bill and notes, he finds due as follows, to wit: on the 18th August, 1837, a note for $356 34; on the 18th February, 1838, a note for $368 34; with interest on the said notes from the times when they respectively fell due."

On the 11th of April, 1843, during the same term, a motion was made for the confirmation of the report and a decree for the sale of the mortgaged premises. Thereupon, reciting that it was shown to the court, that the parties have had two days' notice of the contents of the report; that no exceptions were filed, and no objection made, it was decreed that the report be in all things confirmed; that the defendants pay into the hands of the register, within sixty days, the amount reported due, with interest and costs of suit: in default therof, the master proceed to sell the property described in complainant's bill and mortgage, or so much thereof as may be necessary to satisfy the decree, in separte parcels or entire, as may best promote the defendant's interest, at public auction, in front of the courthouse of Mobile county, under the same rules and regulations that govern sheriffs in making

sales of like property under execution. Further, that he give public notice once a week for thirty days previous thereto, by publication in some nowspaper printed in the city of Mobile; and also, by posting notice on the door of the courthouse of the county. The master was directed to report his proceedings to the next term of the court.

At a further day of the same term, the defendants moved to set aside the report and order of reference, on the ground that Eleazar Hartwell had not been made party to the suit. But the chancellor was of opinion, that as he had made an absolute assignment of his interest in the mortgaged property, there was no necessity for making him a party; and accordingly he overruled the motion.

G. N. Stewart, for the plaintiff in error, made the following points:

1. It is not expressly charged that the complainant is the assignee of the notes and mortgage, but there is a mere general recital of the fact; and even this is not sustained by proof. [Story's Eq. Plead. 205.]

2. The administratrix of George W. Owen, could not assign the notes and mortgage; upon his death, his heirs acquired rights in the lands in question. [Story's Eq. Plead. 184, § 201.] Besides, the duty of the personal representative is to collect, not to assign debts due to the decedent's estate.

3. The notes are described in the bill as having been made payable to the order of the makers and others, but it is not alleged or proved, that they were ever indorsed, so as to make them demandable.

4. The bill is inconsistent in stating that Eleazar and John Hartwell made a mortgage to the complainant, when the mortgage recited appears to have been made to Lipscomb and Owen.

5. The whole debt does not appear to have been before the court, although the bill alleges that all the notes are unpaid; nor does it appear that the original mortgage was produced.

6. The report of the master was confirmed at the same term at which it was made, without allowing time to except.

7. It is not charged that the mortgage was recorded, nor does the proof show that it was within the time prescribed by law, so that it does not appear that the complainant may proceed against

Wilkins; and in fact, no sufficient reason is perceived for having made him a party.

8. The decree should not have left it to the discretion of the master to sell the property all together, or in separate lots.

9. E. Hartwell should have been made a party. He was a mortgagor, and no deed assigning his interest, appears to have been produced. [Cullum v. Batre, 2 Ala. Rep. 415; Clay's Dig. 355, § 65.]

P. Phillips, for the defendant. The statement, that the mortgage was made to the complainant, is a mere clerical *misprision*. The exhibit shows that Lipscomb and Owen were the mortgagees. Eleazar having conveyed his interest in the premises to John Hartwell by deed, he was an unnecessary party.

As to the propriety of making Wilkins a party, some of the notes were payable to him, and he held the mortgaged premises under his co-defendant; these facts, it is conceived, made him a proper, if not an indispensable party.

The master reported two notes to be unpaid, and the inference is, that the complainant showed no title to any others, or that they were paid. [Redwood v. Levert, 9 Porter's Rep. 79.]

The decree clearly recites, that the appellants had notice that the master's report was made, and that they did not except to it. As to the decree being rendered in the alternative, and investing the master with discretion in the sale, this is authorized by Cullum v. Batre, [2 Ala. Rep. 415.]

The motion to set aside the decree because Eleazar Hartwell was made a defendant, shows that the appellants were in court. They should then have made their objections, and cannot now be permitted to interpose mere technical exceptions to the proceedings below.

COLLIER, C. J.—It was said by Lord Hardwicke, that in pleading, "there must be the same strictness in equity as at law." [2 Atk. Rep. 632.] But Mr. Justice Story says, "however true this may be as to a plea in equity, technically so called, it can hardly be affirmed to be true in the framing of bills or answers, in respect to which more liberality prevails. And it may, perhaps, be correctly affirmed, that certainty to a common intent is

the most that the rules of equity ordinarily require in pleadings for any purpose." [Eq. Plead. 206.]

Uncertainty in a bill, it is said, may arise in various ways: 1. In the case intended to be made by the bill. 2. Though the case intended to be made be certain, yet the allegations of the bill may be vague and general. 3. Some of the material facts may be stated with sufficient certainty, and others again with so much indistinctness or incompleteness as to their nature, extent, date, or other essential requisites, as to render inefficient those with which they are connected, or upon which they depend. [Story's Eq. Plead. 207, *et post*, and cases there cited.] In Cresset v. Milton, [1 Ves. jr. Rep. 449,] the bill was brought to perpetuate a right of common and way; the allegation was, that the tenants, owners and occupiers of certain lands of a manor, "*in right thereof or otherwise*," from, &c., had and of right ought to have common of pasture, &c. The bill was held bad on demurrer; for "it was not set forth as common appendant, or as common appurtenant, but as that, "or otherwise," which was no specification at all, and left any sort of right open to proof. So, in Jones v. Jones, [3 Meriv. Rep. 160,] which was a bill by an heir at law to restrain the defendant from setting up an outstanding term, &c.; but as there was no averment of any outstanding terms, it was held bad on demurrer. And where a bill sought a general account upon a charge of fraud, it is not sufficient to make such charge in general terms; but it should point out particular acts of fraud. [Palmer v. Mure, 2 Dick. Rep. 489.] But the complainant is not bound to state *all the minute facts;* the general statement of *a precise fact* is usually sufficient. The circumstances which confirm or establish it, more properly constitute matters of proof than of allegation. [Story's Eq. Plead. 212.]

In the present case, the complainant describes himself as the assignee of A. S. Lipscomb and the administratrix of G. W. Owen, deceased; and after describing the date, and amount intended to be secured by a mortgage to L. and the intestate, the bill continues, "whose interest has been legally transferred and assigned over unto your orator, that certain part or parcel, situate," &c., (here follows a description of the mortgaged premises.) The notes are described as bearing even date with the mortgage, payable some of them to the order of the defendant Wilkins, the others to the order of the makers; and all of them for unequal

sums, payable and negotiable at the Planters' and Merchants' Bank of Mobile. It is charged, that although the notes have since been due and payable, yet the mortgagors have failed and refused to pay the same, "whereby the legal estate to the said premises has become absolute in your orator." In all this, there is no allegation that the complainant is the assignee of the notes, or either of them; the inference that such is the fact, is not necessary and direct. It may or may not be so. If the terms in which the case is attempted to be stated, are to be understood as having been employed according to their appropriate use, and with their usual meaning, they rather show that the complainant is the assignee of the mortgage than the notes. And it is not only not alleged that the complainant was the assignee of all the notes, but it is not stated that if either or any of them was assigned to him, which it is.

It may be true, that the mortgage may have been assigned to the complainant by the mortgagees, yet this would not authorize him to file a bill for a foreclosure. In Doe ex dem. Duval's heirs v. McLoskey, [1 Ala. Rep. N. S. 708,] it was determined, that a mortgagee cannot assign the right to the mortgaged property without also assigning the debt to which it is an incident, yet it seems he may relinquish, *by contract*, the possession of the mortgaged premises to a third person until the debt is paid.

Without amplifying the point, it sufficiently appears from what has been said, that the bill is obnoxious to the objection of uncertainty. That even if the case intended to be made by the bill is certain, the allegations are too vague and general to authorize a court of equity to entertain it.

Although some of the notes are payable to the order of the makers, and do not, upon their face, import a promise to pay any one, yet the mortgage is an acknowledgment that they were the property of the mortgagees—that the mortgagors were bound to pay them; and in order to their security, conveys the land described in it. This is quite sufficient to show, that the notes have been transferred by the maker, whether by writing, or mere delivery is wholly immaterial in the present case. True, in order to maintain an action at law upon them, the plnintiff should show a regular transfer; but it is competent for the holder to entertain a suit in equity, though they were transferred by delivery only.

The bill should state of which of the notes the complainant is

the proprietor; if any one of them maturing before those he holds is paid, or outstanding, unpaid, the fact should be stated, and the holder made a party. In respect to subsequent incumbrancers, although they are proper, yet they are not indispensable parties. [Judson v. Emanuel, et al. 1 Ala. Rep. N. S. 598; Cullum, et al. v. Batre's ex'rs, 2 Ala. Rep. 415.]

In respect to the other questions made by the plaintiffs in error, it is unnecessary now to consider them. They are mere questions of practice, about which it is not probable that any controversy will arise in the ulterior progress of the cause; especially if the decisions we have heretofore made touching the interest of surviving payees, the powers of executors and administrators, parties in equity, the registration of deeds, and the duties of masters in chancery, are consulted.

It follows from what has been said, that the decree of the court of chancery must be reversed, and the cause remanded. But inasmuch as no objection to the frame of the bill was taken in the primary court, the defendant in error will not be taxed with the entire costs; each party will pay their own costs in this court.

HARRELL v. MARTIN, PLEASANTS & CO.

1. Evidence is admissible to show when in fact an execution issued, either by proving that the clerk made a mistake in the *teste* of the writ, or that it has subsequently been altered.
2. A writ of *fieri facias* does not become a record of the court until it has been returned by the sheriff.

ERROR to the Circuit Court of Madison.

This was a motion in the court below, to quash an execution, because, though issued more than three days before the then next succeeding term of the circuit court, it was made returnable to the second term after.

Upon the trial of the motion, the clerk proved that he issued

the execution on the 23d Nov. 1841, and that it was dated of that date, and not the 23d Sept. 1841, as it now appears, the word *Sept.* being written over an erasure.

The sheriff proved that the previous execution had remained in his hands until the 23d November, 1841, when he returned it to the clerk, and that he stood by him until he issued the execution, to quash which this motion is made. That when he, as sheriff, levied and returned the last execution, it was not altered. He also stated it as his belief, that the execution was issued on the same day that another which he mentioned was quashed, but that was shown to be on 28th Oct. 1841. The entry on the execution docket of the clerk, showed that the execution was issued on the 23d Nov. 1841, and he had made a similar memorandum on the previous execution.

Two witnesses were introduced, who swore that they were acquainted with the hand writing of the clerk, and that they believed the word "Sept." was in the hand writing of the clerk.

The defendant moved to exclude the testimony of the clerk and sheriff, which motion the court rejected, and he excepted and overruled the motion to quash the execution.

The assignments of error are,

1. In the admission of the testimony.
2. In overruling the motion.

Moore, for the plaintiff in error—cited 1 Ala. Rep. 104; id. 650,

Robinson, *contra.* [5 B. & C. 149; Peake's C. 209; 3 Starkie's C, 138; 2 Stewart's R. 492.]

ORMOND, J.—We think it very clear, that the court did not err in receiving testimony to show when the execution in fact issued. If the clerk, by mistake, should teste the writ improperly, or the date should be afterwards altered, the court has the power to correct it.

A writ of *fieri facias* does not become a record of the court until it has been returned by the sheriff, and is as much within the control of the court, as the declaration or any other part of the cause, upon a question of this character. The evidence is very satisfactory as to the time when the execution was in fact issued by the clerk, and there being no error in the judgment of the court, it is therefore affirmed.

SLEDGE'S ADM'RS, ET AL. V. CLOPTON.

1. C. delivered certain slaves to S., his creditor, the latter stipulating that when the wife of C. would pay him the debt intended to be secured by a pledge of the slaves, that he would settle them upon trustees to her separate use: the wife offered to pay the amount due to S., and demanded the slaves in obedience to his agreement; which he refuses: *Held*, that the contract of S. made him a trustee *sub modo* for the wife, and that the tender of his demand entitled her to go into equity to enforce the execution of the trust.
2. Where one person receives a conveyance of property, upon a verbal stipulation that he will dispose of it absolutely or conditionally for the benefit of another, he will be compelled to perform his engagement.
3. Where the question is, whether slaves were sold absolutely, or delivered as a pledge upon a promise that when the sum intended to be secured was paid, the person receiving them would settle them upon the creditor's wife, the difference between the debt and the value of the slaves, the failure to deny the right to redeem when the debt was tendered, and the declaration of the creditor made contemporaneously with the reception of the slaves, that he had bought them for the wife, are strong circumstances to show that they were not purchased unconditionally.
4. If one person receives property from another, under an agreement to settle it on trustees for the benefit of the wife of the latter, a court of equity should not refuse to coerce an execution of the trust, because the details of the settlement cannot be ascertained by the most stringent proof.
5. The loss of a private paper is sufficiently shown so as to admit secondary evidence of its contents, by proof that it could not be found where it was last seen, or amongst the papers of those persons to whom it would most probably be intrusted.
6. A party who has received property under an agreement to transfer it to a third person, cannot object to perform his contract because the party delivering it to him was indebted either to himself or others.
7. The statute of limitations of 1802, "For the limitation of actions," does not begin to run against a married woman, until she becomes *discovert*; nor will the staleness of the demand prevent a recovery, where the statute has not completed a bar.

WRIT of error to the Court of Chancery sitting at Montgomery.

In December, 1841, the defendant in error filed her bill against the plaintiffs; and in July 1842, filed an amended bill. The allegations of both, so far as it is necessary to notice them, state that the complainant in 1812, in the State of Georgia, intermarried

with James B. Clopton, with whom, some time thereafter, she removed to the town of Montgomery, in the State of Alabama.—That shortly after the complainant's marriage, her father gave her, by way of advancement, two female slaves, named Rose and Scilla; some time thereafter, the former bore a female child, called Celia, and the latter three children, to wit, Hannah, Ben and Washington. *Further*, that James B. Clopton, in 1828 or 9, borrowed four hundred dollars of Chappell Sledge, the intestate (who was the husband of the complainant's aunt;) and was otherwise indebted to him in the sum of three hundred and twenty-five dollars. For the twofold purpose of securing the re-payment of these several sums of money, and making a settlement upon the complainant, her husband delivered the above named slaves to the intestate, upon an agreement that he should retain them in his possession until the debt due him, was paid, and that thereafter he would by proper deeds, settle and convey them to some proper person *in trust*, for the sole and separate use of the complainant, in such manner that they should not be liable to the debts or contracts of her husband.

It is alleged, that the slaves in question were worth, at the time of this transaction, between fifteen hundred and two thousand dollars; and that the intestate, when they were placed in his possession, executed a writing, which he delivered to one Livingston, the son-in-law of the complainant and her deceased husband for safe keeping, but which is lost or mislaid, so that it cannot now be produced. By that writing, the intestate acknowledged that he held the slaves for the complainant, and that he would convey them to trustees for her sole and separate use, so soon as he was paid the sum of seven hundred and twenty-five dollars due, as above stated.

The bill charges, that about the year 1830 or '31, the complainant in company with a friend and relative, called on the intestate and offered to pay him the sum for which he held the slaves in pledge, together with interest thereon, and requested that he would convey the same to trustees for her sole and separate use, according to the terms of his agreement. But without denying that he held the slaves, on the terms and for the purposes alleged, the intestate declined a compliance with the complainant's request, assigning as reasons; that the complainant had borrowed the money from the friend who accompanied her, and

that he had as well retain the possession as the friend in whose hands she would place them; and being assured that he was mistaken as to the source whence she had obtained the money, then he objected, because her husband owed him other debts.

It is also stated, that all the slaves, with the exception of Hannah, still remain in the possession of the intestate's administrators; that Hannah was loaned by intestate to Lucian Pinkston, who had intermarried with his daughter, Pamela. That at the time she was delivered by the intestate to his son-in-law, the latter was informed of the circumstances under which his father-in-law held her.

The bill avers that the complainant's husband died in September, 1836, intestate and very poor, so that no administrator of his estate has been appointed; that Chappell Sledge died in 1841, and his administrators have advertised the slaves (with the exception of Hannah) for sale, in order to make distribution of the estate among those entitled thereto. That the hire of the slaves from the time of the tender and demand by the complainant, up to the time of the death of Sledge, was more than sufficient to satisfy the sum, for the payment of which, they were intended as a security. The administrators and Pinkston and wife are made defendants; and the bill prays that the sale by the administrators be injoined, that an account be taken, and that the complainant be permitted to redeem the slaves, &c. and that they be settled on her as contemplated by the agreement between her husband and Sledge, &c.

The administrators in their answer, deny any knowledge of a a mortgage or conditional sale of the slaves to their intestate as alleged by the complainant—know nothing of any writing having been executed by their intestate, when he acquired the possession of the slaves, or at any other time—they had believed, and still do believe that the complainant's husband made an absolute sale of the slaves to their intestate; and insist that the several matters alleged, shall be proved.

Pinkston and wife answer, that they believe that Sledge was the owner of Hannah, under a purchase from the complainant's husband, for a full and fair consideration; and that he gave her to them shortly after their intermarriage, and when they were entirely ignorant of any claim by the complainant or any one else.

All the defendants in their answer, insist upon the statute of limitations, and also claim the benefit of a demurrer.

To show that the complainant's husband was indebted to the intestate, the administrators exhibited with their answer a deed of trust, from which it appears that he owed by promissory notes, bearing date the 20th January, 1830, a sum of money from seven to eleven hundred dollars; which was attempted to be secured by a transfer of property other than the slaves in controversy.

Benjamin F. Tarver, a witness for the complainants, states, that eleven, twelve or thirteen years ago, he accompanied her (by her request) to the house of Chappell Sledge, when she offered to pay him seven hundred and twenty-five dollars, with interest thereon, (if he desired it,) and demanded of him four or five negroes, the precise number, with their names and descriptions not remembered. The complainant stated to Mr Sledge, that she had come to redeem certain negroes which he held, and for which she tendered the money. Mr S. replied to the demand, that if she got the negroes back, they would have to be made over to some one for her, and that he had as well keep them as any one else. Witness does not remember that Mr S. claimed the negroes as his own, whether he admitted a trust for the complainant, or denied the right to re-purchase or redeem them.—He does not remember that the complainant asked permission to re-purchase the negroes as a favor, because they had been derived from her father, nor has he any recollection that any thing was said of a writing executed by Mr Sledge—he has no knowledge of such a writing.

Waldegrove Clopton, a witness for the complainant, testifies, that he is her son, that his father owned and had possession of the slaves in question, and that they were placed in Sledge's possession in virtue of some instrument which was drawn up by T. W. Livingston, a son-in-law of complainant. Witness has all the papers belonging to his father's estate in his possession, and has searched among them for the instrument referred to. He saw Sledge execute the writing, and Livingston fold it up and lay it on the table by which he sat. Witness heard only a portion of the writing read, and that related to a poney (which he claimed) and the negroes in question—it provided that Sledge should retain the property mentioned in it, until the complainant paid the money due him, when he was to make it over to her. Mr Sledge informed the complainant on the evening of the day the instrument was executed, or on the next day, that he

had let her husband have money, and would take the negroes in question, and when she paid him, she could have them; and desired her, if she had any objections, to make it known, and he would not take them away. The negroes were crying as they were about to leave, and Mr Sledge said to them, that they need not be disturbed, for complainant would make the money and bring them back. Witness was born on the first of January, 1818, and the transaction to which he refers, took place in the spring or fall of 1829. At the time the writing was executed, witness' father, Mr Sledge, T. W. Livingston and John S. Bailey were present—Mrs Mitchell and Mrs Lees came into the room, the former merely passed through, the latter stopped for a few moments.

Mrs Virginia Lees testifies to the transaction substantially, as does the last witness, and states, that seven hundred and twenty-five dollars was the sum to be paid by the complainant to Mr Sledge, before the slaves were to be given up by him. Witness states further, that about eighteen months after the negroes were delivered to Mr S. the complainant said to him, that in a short time she thought she would be able to raise the money he let her husband have, and supposed he would give up the negroes; to which he replied, whenever you pay me the money you shall have the negroes. Witness is a daughter of the complainant, and was the wife of T. W. Livingston, who is dead—had all his papers for four or five years, when she burned them—does not know that the writing signed by Mr. Sledge, was among them; though she saw it in her deceased husband's hands, after it was executed; but whether delivered to him for safe keeping, she cannot say.

Mrs Mary Mitchell was present when the transaction between complainant's husband and Mr Sledge, was being consummated, and very fully sustains Mrs. Lees in every thing that she says in relation to it, and also repeats the subsequent conversation between the complainant and Mr Sledge. This witness is silent as to the writing referred to by those who preceded her.

The second and third witnesses prove the death of the complainant's husband and Mr Sledge, at the time alleged, and they and Mrs Mitchell all state, that Britton D. Harris was not present when the agreement was completed. The two former also testify, that the writing which they saw executed, and heard read

in part, was not a deed to either Sledge or Ross, in trust for complainant or any one else.

Justus Wyman testifies, that in 1828 or '29, he was endeavoring to induce Chappell Sledge to secure or pay an indebtedness of Clopton to him, but he refused to do so. Sledge said that he had been advancing or paying money to Clopton on account of negroes, and had advanced to the extent of their value. He does not remember that he said that he bought them, or any thing about settling them on complainant, so that they could not be sold for Clopton's debts.

Wm. A. Campbell states, that in 1828 or '29, he had a conversation with Sledge, in which he said he had to buy the negroes of Dr. Clopton, for the benefit of the complainant. He did not state the terms and conditions—mentioned a woman and children, but did not state what woman or children, or how many children.

John L. Mitchell, from a vague and indistinct recollection of the value of slaves in 1828 and '29, expressed his opinion of the value of the slaves in question; according to the best of his recollection, they were worth about two thousand dollars. These are the only witnesses examined at the instance of the complainant.

Britton D. Harris, a witness for the defendants, states, that he is the half uncle of the complainant by consanguinity—knows all the negroes in controversy—held a lien on three of them, executed by Dr. Clopton, on the 19th September, 1829, to indemnify him as his surety. When the debt became due, Dr. C. was unable to pay it, and the three negroes embraced by the deed of trust, were sold to Mr Sledge, the intestate, who assumed the payment of the debt for which the witness was responsible—the complainant assented to the sale, remarking that she desired Mr Sledge to have them, instead of their going out of the family.—Witness does not know the amount of the purchase money—the sum from which he was relieved as a surety, was three hundred and eighty-one dollars and eighty-five cents—Mr Sledge purchased Scilla, Hannah, Ben and Washington, the latter having been born after the deed of trust referred to was executed. The sale was made at Dr. Clopton's house in the latter part of 1829, or in 1830—no one else was present but Dr. Clopton, complainant, Mr Sledge and witness—there was no written or verbal agreement entered into or spoken of, creating a trust or condition, but

the sale was absolute. The slaves mentioned above, were taken to Mr Sledge's plantation, and with the exception of Hannah, remained in his possession until his death, he always claiming and treating them as his own. Hannah was given to his daughter, Mrs Pinkston—witness never heard any complaint, that the price paid for the slaves was too small—he knows nothing of the sale of Celia, though she went with the others to Mr Sledge's.

Witness will not say positively, that there was no condition annexed to the sale, but he did not hear it—that he left Sledge at the place of Clopton's residence, and went home; on the second day thereafter, the negroes reached S's residence in the country.

An affidavit was admitted at the instance of the defendants, stating that the value of the slaves, at the time they were acquired by Mr. Sledge, was about twelve hundred dollars.

The chancellor was of opinion, that Sledge held the slaves as a security for seven hundred and twenty-five dollars; that sum being paid, he was to be treated as a trustee for the complainant, and was bound to execute the agreement to transfer them to the sole and separate use of the defendant; that the statute of limitations did not begin to run until the death of Dr. Clopton, an event which occurred within less than five years previous to the commencement of the suit. It was accordingly adjudged, that the right and title to the slaves be vested in the complainant, as also the increase since they went into Sledge's possession—all of whom are specially named. The master was also directed to take an account of the hire of the slaves from the time the complainants offered to pay Sledge the amount of his lien, making all reasonable allowances for raising the young negroes while their services were of no value, and for all expenses properly incurred about the slaves; that he ascertain the amount due to the administrators of Sledge for principal and interest upon the debt of seven hundred and twenty-five dollars, at the time of making the tender. *Further;* that the administrators of Sledge pay to the complainant, out of the estate of their intestate, the balance of the hire remaining after a deduction of principal and interest on the indebtedness aforesaid. *And lastly,* that they pay the costs of the suit from the estate of the intestate.

Peck, with whom was Ball, for the plaintiff in error, insisted—

1. That the testimony of Harris gave a correct version of the

transaction between Dr. Clopton and Mr. Sledge, and showed that there was a perfect sale without any qualification or condition.

2. The witnesses, Clopton and his sister, Mrs. Lees, were mistaken in supposing that there was a trust or condition evidenced by writing; and may have been honestly mistaken, by confounding the arrangement in respect to the slaves in question, with the deeds of trust to Sledge and Ross; in the former of which a power is included, and in the latter, slaves are conveyed for the separate use of the complainant.

3. The complainant's witnesses heard the paper, in respect to which they testify, read but in part, and their testimony is insufficent to identify and establish it; and if it is shown that such paper ever existed, which is denied, the proof does not show its loss.

4. If Sledge undertook to transfer the slaves to the separate use of the complainant after his demand was paid, it was a mere *nudum pactum*, and could not be enforced.

5. It cannot be intended, from the evidence, that seven hundred and twenty-five dollars was all that Dr. Clopton received for the slaves in question: the fair inference is, that Sledge paid eleven or twelve hundred dollars, which was a fair market price.

6. But if there was a reservation in favor of the complainants, it was void, because her husband was indebted at the time to other persons; and the record shows that some of those debts are still unpaid. [Rochelle v. Harrison, 8 Porter's Rep. 351.]

7. If there was not a valid trust, it could not be enforced so as to avoid the payment of the debt for which Dr. Clopton gave Mr. Sledge his note in January, 1830.

8. But if all other grounds of defence are unavailing, it is insisted, that the statute of limitations will bar a recovery, or the staleness of the demand must forbid its enforcement. [2 Story's Eq. 735; Lewin on Trusts, &c., 614–15–16; 1 Ala. Rep. N. S. 650; 2 Ala. Rep. N. S. 555.]

9. If neither of the points made be defensible, it is contended, that conceding the allegations of the bill are fully proved, Dr. Clopton did not divest himself of all right to the slaves in favor of his wife, after the debt due Sledge was paid. [Clancy on Rights, &c., 259–60; 2 Swanston's Rep. 109–10–11–12; 5 Ves. Rep. 71 to 78; 3 Dess. Rep. 149, 158; 10 Ves. Rep. 139; 7 Johns. Ch. Rep. 57; 2 Ala. Rep. 117, 669.] Even if it appeared that

the slaves in question were a part of the complainant's patrimony, they had been in her husband's possession *suo jure*, and she could not have them settled through the agency of a court of equity. [Clancy on Rights, &c. 410–1; 2 McC. Ch. Rep, 40; 4 Gill. & Johns. Rep. 282; 3 Cow. Rep. 590.]

10. The execution of the trust cannot be specifically enforced, because its terms are not shown with precision. [2 Mason's Rep. 468; 1 Pet. Rep. 600; Gresley's Eq. Ev. 192, note h; 10 Co. Rep. 92, b; 9 Wheat. Rep. 597; 4 Porter's Rep. 297; 2 Ala. Rep. 330; 2 Story's Eq.]

T. Williams, for the defendant in error, contended—

1. That the transaction between Dr. Clopton and Sledge was a mortgage; and the evidence shows, that the latter did not assert an absolute estate; but if it be doubtful what is the character of the transaction, equity will construe it into a mortgage. [Dev. Eq. Rep. 373; 5 Litt. Rep. 84; 2 J. J. Marsh. Rep. 471; 3 id. 354.] The evidence of Harris does not prove the reverse. He speaks of an arrangement between Clopton and Sledge in an imperfect state, and which was doubtless modified and perfected on the same or the succeeding day, when W. Clopton, Mrs. Lees and Mrs. Mitchell were present. This conclusion is entirely reasonable, as Sledge was left by Harris in Montgomery, and the slaves did not reach his house in the country until two days afterwards.

2. Sledge had no lien, either in fact or in law, beyond the sum due and secured to him at the time the negroes were delivered. Dr. Clopton gave the equity of redemption to the complainant, and the mortgagee undertook, when he was paid, to convey it to trustees to her separate use. The right of the husband to confer such a bounty upon the wife, has not been disputed, and is regarded as clear. [Clancy on Rights, &c. 259, 279; 1 Atk. Rep. 270.]

3. The intestate obtained possession of the slaves in question under a promise that they should be transferred in trust for the complainant, upon a payment, by her, of seven hundred and twenty-five dollars; and neither himself or his administrators can be permitted to dispute the right of the *cestui que trust*, and set up an adverse claim. Such a pretension on the part of Sledge or his administrators, will be regarded a fraud, and treated as a breach of trust. [2. Ala. Rep. 596.]

4. The evidence of Tarver shows a tender of the money for which the negroes were mortgaged to Sledge within a year or two after they were delivered to him.

5. Where one person stipulates with another that something shall be done for a third person, the latter may sue even at law for a failure to perform it. [7 Johns. Ch. Rep, 57.]

6. It is immaterial whether the agreement to transfer the slaves to the complainant was founded on a valuable consideration. The intestate or his representatives could not set up the want of consideration: the intestate's undertaking estops him. Whether creditors may cause a sale of the slaves for the payment of their debts, is another question. [7 Johns. Ch. Rep. 63; 12 Ves. Rep. 103.] But mere indebtedness, or a single debt, is not sufficient to avoid a voluntary settlement. [5 Ves. Rep. 384; 8 Wheat. Rep. 248, 250.]

7. The point made by the answer is, not whether the equity of redemption was given to the complainant, but whether the negroes were sold absolutely to Sledge; if, then, the court is satisfied, that the transaction was a mortgage, the evidence need not be *entirely conclusive* to show that the complainant is entitled to the right she asserts.

8. Dr. Clopton's representatives (if any) need not be made parties: the bill shows that his estate has no interest to protect. [5 Litt. Rep. 85; 7 Johns. Ch. Rep. 144.]

9. The statute of limitations did not begin to run until after Dr. Clopton's death, in September in 1836, and could not operate a bar until 1842, more than one year after suit commenced. [1 Ala. Rep. N. S. 650; 2 id. 551.]

COLLIER, C. J.—The first question which presents itself, is, does the bill disclose a case of which a court of equity can take jurisdiction? Upon this point, the material allegations are, that the husband of the complainant, in his lifetime, conveyed to the intestate, Sledge, several slaves, (particularly described,) for the twofold purpose—1st, Of securing to the intestate the sum of seven hundred and twenty-five dollars, which Dr. Clopton owed him for a previous indebtedness and for money then lent; 2d, To cause a settlement to be made on the complainant. The first object being effected, the intestate undertook to convey the slaves to some suitable person *in trust* for the sole and separate use of the

complainant, so that they should not be liable for the debts or contracts of her husband It is also alleged, that one or two years after the slaves were thus delivered to the intestate, the complainant tendered to him the sum for which they were pledged with all interest due thereon, and requested that he would convey the same to trustees for her sole and separate use according to the terms of his agreement. Without denying that he held the slaves in trust, the intestate declined a compliance with her request, saying that she had borrowed the money from a friend, and that he had as well hold them as the friend; and upon being assured that he was mistaken, he then objected to delivering them up, because her husband owed him other debts.

A separate estate to the use of a married woman may be created either before or during coverture; and after marriage, as well by the husband as a stranger. [Clancy on Rights, 251.] But the act by which the husband divests himself of his property must be clear and unequivocal; though it is not always necessary to induce a court of equity to sustain it in favor of the wife, that trustees should be interposed. The powers of that court are competent to effectuate it by the appointment of a trustee, and where no other is designated, will generally treat the husband as such. [Clancy on Rights, 259—260. See also, McLean v. Logland, 5 Ves. Rep. 71; Walter v. Hodge, 2 Swanston's Rep. 97, 109; Shepard v. Shepard, 7 Johns. Ch. Rep. 57.]

In Shepard v. Shepard, [7 Johns. Ch. Rep. 57,] the father conveyed land to his son, on the latter covenanting to pay an annuity to his mother, during her widowhood: held, that she might maintain an action on the covenant for her benefit, and a release of the covenant by the husband in his lifetime, is fraudulent and void as it regards her. The court say, "The relationship between the husband and wife was sufficient to entitle the plaintiff to her action upon the covenant to her husband, and which was made for her benefit. The consideration enured from the husband, and arose from the obligations of that relation, and the release of the son from his covenants, by the father, was fraudulent and void, as respected the plaintiff, who had the sole beneficial interest in the covenants, and who was alone entitled in equity to release them." [See also, Dalton v. Poole, 2 Lev. Rep. 210; Martyn v. Hind, Cowp. Rep. 443; Doug. Rep. 142; Marchington v. Vernon, 1 Bos. & Pul. 101, note a.]

In the case before us, the husband conveys to a third person, who, it is stated, undertook to convey the same property to trustees, so as to create a separate estate for the wife whenever she paid him a sum of money which the grantor owed him. Here, the husband has divested himself of the estate in the slaves, and parted with the possession to one, who has engaged to perfect his intentions. The inducement of Dr. Clopton, so far as the bill informs us, thus to provide for the complainant, was certainly sufficient, and the motive in itself commendable. If no settlement had been made on her previously, and the fair inference is, that none had, the husband was but obeying the mere dictate of duty in securing to the wife the small patrimony with which she had been advanced by her father. The contract of Sledge made him a trustee for the complainant, *sub modo*, and he was bound to execute it according to its terms. True, in order to entitle the complainant to claim the benefit of the provision which her husband had made for her, it was necessary that she should pay, or offer to pay the amount for which the slaves were pledged to the intestate. The alternative of this duty, the bill alleges, was performed.

It is unnecessary to determine whether the contract of the husband, so far as he attempted to provide for his wife, was, as it respects himself, a *nudum pactum*. If the law be correctly laid down in the case cited from 7 Johns. Ch. Rep., it would seem that it was not competent for Dr. Clopton to have released Sledge from an execution of the trust; but be this as it may, it is not pretended that a release was attempted. We have seen that the husband may create a separate estate for his wife even during marriage; and his obligation to provide for her, will, as it respects himself, constitute an adequate consideration for such an act. This being the case, the complainant must be regarded as standing in a predicament which entitles her to the favorable consideration of a court of chancery. But conceding that the contract between the husband and the intestate, was gratuitous so far as it concerned the wife, and the defendants gain nothing by the concession. It is an unquestionable principle, upon which equity often acts, that where one person receives a conveyance of *any description of property*, upon a verbal agreement, that he will transfer or dispose of it absolutely or conditionally for the benefit of another, he is bound to perform his engagement. He is

treated as a trustee, and his refusal to execute the trust considered a fraud. To him, it is wholly unimportant whether there was any consideration of pecuniary value, or founded in moral or social duty, moving from the *cestui que trust*, to induce the act of the grantor. As it respects the trustee, it is quite enough to say, that the grantor has willed it, and you have undertaken to consummate his purpose. [Kennedy's heirs and ex'rs v. Kennedy's heirs, 2 Ala. Rep. 571.] From this view, it results that the bill is not wanting in equity; and, consequently, that the court very properly refused to sustain the demurrer.

This brings us to inquire, whether the case, as stated, is sustained by the proof. Waldigrove Clopton, Mrs. Lees and Mrs. Mitchell all testify that the transaction between Sledge and Dr. Clopton was such as the complainant alleges. The two former say that they heard a part of the writing, executed by Sledge, read, that it provided for the retention of the slaves by him until his debt was paid, then, to use their own language, they were to be *made over* to the complainant. The latter witness harmonizes with them in her statement, but says nothing about the writing. After the writing was executed, and Sledge was about to remove the negroes to his own home, they all affirm that he repeated to the complainant his contract with her husband, just as the two former witnesses had understood it from having heard it read.

It is quite probable that Mrs. Mitchell never heard the contract read, as it is stated by W. Clopton, that she merely passed through the room while it was being executed. This, perhaps, may account for her silence in respect to it. The fact that the pony was conveyed by the deed of trust from Dr. Clopton to Sledge, would not be sufficient to show that another, or even the same, was not embraced by the writing in question. But be this as it may, it does not authorize us to disregard, *in toto*, the testimony of W. G.; it would merely prove that his memory was at fault in one particular, not very essential, and if his evidence stood alone and unsupported, we might accord to it less influence; but sustained as he is by the direct evidence of two witnesses, as to the material points, he must be believed. At most, in the immaterial matter, he is only chargeable with a mistake, to which any one, after a lapse of twelve years, would be subject.

The testimony of these witnesses is sustained by all the others whose depositions are taken at the instance of the complainant, with the exception of Wyman; and his evidence, (even if admissible,) proves nothing material for either party. The great difference between the sum for which the slaves were conveyed to Sledge and their true value, is a strong circumstance in connection with others, to show that the sale was not absolute. So the failure to deny the right of the complainant to redeem at the time about which Tarver testifies, is another corroborative circumstance which, if necessary, might be appealed to. Add to all this the evidence of Campbell, that Sledge told him, in 1828 or '29, he had to buy the negroes of Dr. Clopton for the complainant, and it must be admitted, that unless the countervailing evidence overbalances the proof in her favor, the case, so far as it depends upon the facts, is well made out.

The testimony of Harris, whose deposition was taken for the defendants, proves that Dr. Clopton, in 1829 or '30, sold Scilla and her three children, who are named in the bill, to Sledge, with the assent of the complainant—that there was no written or verbal agreement entered into or spoken of, creating a trust or condition. This transaction took place at Dr. Clopton's residence in Montgomery, when no one else was present but the witness, complainant and the parties. Witness left Sledge at Dr. Clopton's house, and on the second day thereafter, the negroes reached the residence of S. in the country. He knew nothing of the sale of Celia, though she accompanied the other slaves to their new home. The testimony of this witness is not at all irreconcileable with the other evidence in the cause, but the fair inference is, that although the terms for the sale of some of the negroes were agreed on, yet the transaction was modified; that Rose and her child were also embraced by it, and instead of being absolute, it was made such as the complainant's witnesses represent it. The witnesses, who make out the case, show, by their evidence, that Harris was not present at the time the contract, of which they speak, was consummated; and as the slaves were removed by Sledge immediately thereafter, it is clear that they depose to a transaction which was perfected after he had left the parties. This view is sustained by the evidence of Campbell, and enforced by the principle which requires that even con-

flicting testimony shall be reconciled as far as practicable, so that witnesses shall receive all due credence.

As the testimony of the complainant's witnesses are not impugned, either directly or by conflicting proof, the relation which the three first, whose testimony is commented on, bears to her, can have no influence upon their credibility; and we are not particularly called on to notice the fact. They are confessedly competent—have made a statement consistent with itself, and according to the course of procedure in equity, it must be regarded as true.

It is argued for the plaintiffs in error, that the witnesses who speak of the execution of a writing by Sledge, heard it read but in part, and cannot, consequently, prove its contents, so as to enable the court to enforce its execution. If it is shown that the intestate had no claim upon the slaves in question, save only to secure the payment of seven hundred and twenty-five dollars; that sum being paid, an objection that it does not appear what ulterior disposition shall be made of them, when urged by his representatives, should receive but little favor. It is true, that the two witnesses who testify as to the writing, do not profess to have heard it all read, yet they speak of it in such a manner as to induce the conclusion that in this they were probably mistaken: they say that it professed to convey to Sledge the negroes as a security for the payment of a certain sum of money due him, and upon that being paid, they were to be transferred by Sledge to *trustees* for the separate use of the complainant. This is about every thing that one would expect to find in such a writing. Besides the three witnesses who were present when the transaction was consummated, affirm that the intestate stated to the complainant, that such was the contract he had made with her husband.

But conceding that the proof upon this point is not so explicit as could be desired, does it furnish a reason why the intestate's representatives should be protected in the possession of property to which it is clear they have no title? A similar objection was made to setting aside the deed in Kennedy's heirs and ex'rs v. Kennedy's heirs, [2 Ala. Rep. 622.] The court held, that it could not be sustained, though from a defect of proof it might be impossible to execute entirely the intentions of the grantor. "If the law were otherwise, the grantor and his heirs might have ac-

quired an indefeasible estate, without having paid any equivalent therefor." If the intestate was a trustee, with a lien for the payment of a debt, the debt being paid, his representatives have no further claim upon the property except for the purpose of executing the trust; and the details of the settlement raise a question in which the complainant and the distributees of her husband are mainly interested. And the latter, as they are not parties to this litigation, are not concluded by the decree of the court. But we repeat that the proof, so far as the present case is concerned, is sufficient to enable the court to determine, what should be the terms of the settlement.

In respect to the proof of the loss of the writing, we think it entirely satisfactory. After establishing its existence, the witnesses state where they had last seen it, and that it could not be there found, or amongst the papers of those persons to whom its custody would most probably be entrusted.

The evidence of Tarver is quite sufficient to prove a demand of the slaves by the complainant in 1830 or '31, and an avowal of her readiness to pay to Sledge the amount of his lien, as well as the refusal of the latter to relinquish the possession of them.—This, although not an actual tender, is equivalent to it, as the refusal to receive the money made the offer of it unnecessary. The evidence of this witness is strongly sustained by Mrs. Lees.

It is not allowable for the defendants to avoid the execution of the trust, which had been undertaken by Sledge, by setting up the indebtedness of Dr. Clopton. That is a matter with which they should have no concern. If the creditors are willing to acquiesce in the provision which is made for the complainant, no objection can be listened to from any other quarter; and least of all from those, who stand in the predicament of one who has undertaken to be the executor of the debtor's bounty. [Clancy on Rights, &c. 279—280; Curtis v. Price, 12 Ves. Rep. 103.] Conceding that the transaction between Dr. Clopton and Sledge, so far as it relates to the complainant, was voluntary, and intended by her husband to defeat his creditors, yet is it competent for one who has engaged to carry out the husband's intentions, to object to a compliance, because the latter intended to defraud some third person, or such was the legal effect of the thing done? We think not. To entitle the defendants to litigate this question, even if the doctrine of estoppel interposes no barrier, they should show that

they have an interest in defeating the settlement upon the complainant, beyond that of the testator.

But it is said, that the trust should not be enforced, so as to prevent the collection of other debts due Sledge, than those for which the negroes were pledged. This objection is most clearly indefensible. If Dr. Clopton was indebted to the intestate at the time he transferred to him the possession of the slaves, in an amount beyond what it was stipulated they should secure, the undertaking of the latter to settle them upon trustees upon being paid the sum provided for, would be a waiver of all right to subject them for the payment of further liabilities. This waiver might be maintained as a contract; the consideration for which would be, that the slaves had been conveyed for the security of a debt agreed on by the parties; an act which, it may be inferred from the proof, was induced by the intestate's stipulation in favor of the complainant. The refusal to perform such an undertaking would be a fraud on Dr. Clopton and the complainant, and a breach of good faith, which a court of equity cannot favor. [Clancy on Rights, 508–9.]

In respect to liabilities incurred by Dr. Clopton, subsequent to the transaction in question, the trust which was conferred upon the intestate for the benefit of the complainant, would prevent the slaves from being charged with their payment. Where one parts with the possession of property to the donee, it cannot be subjected to the payment of debts afterwards contracted; especially where it is not shown that the gift is intended to defraud subsequent creditors. In the case before us, the pretence for charging the property with such debts, is much less plausible than in the case supposed; for here the creditor was the trustee, had possession of the slaves, and knew that the debtor had parted with all his interest in them.

The act of 1802, "For the limitation of actions," &c., [Clay's Dig. 326–7,] after declaring the time within which actions of *detinue*, trover &c., shall be commenced, provides as follows: "That if any person or persons, who is, are, or shall be entitled to any of the actions hereinbefore specified, is, are, or shall be, at the time of any such cause of action accruing, within the age of twenty-one years, *feme covert*, or insane, then such person or persons may institute such action, so that the same be instituted within such time as is before limited, after his, her, or their com-

ing to or being of full age, *discovert*, or of sane memory." The case at bar is more like the action of *detinue* than any other form of action at law; and, consequently, if either of our statutes of limitation be applicable, it is the one cited. But the *proviso* of this act declares that it shall not operate against a *feme covert;* and there is, therefore, no pretence for supposing that the statute began to run against the complainant previous to the death of her husband—an event which occurred in September, 1836. The bill was filed in December, 1841, within less than six years after the complainant became discovert; and, consequently, before the statute bar was complete.

The period of limitation prescribed by the statute, not having expired, the complaint cannot be said to be of an origin so stale, that a court of chancery should refuse to recognize and enforce it. If there is a statute applicable to the case, the doctrine of staleness need not be invoked. But conceding that the case is not embraced by the statute; and still we think its antiquity is not such as to authorize its repudiation. During the life of the husband, the wife is subject to his dominion and control, and cannot be expected either to release or assert her rights, unless it be with his advice and, perhaps, co-operation. No presumption, then, can be made embracing the time previous to the death of the husband, that the demand of the wife has been adjusted; but all presumptions must take date from the dissolution of their union by death. This being the case, only five years and three months had expired from the time the complainant became *discovert*—a period quite too short to warrant the rejection of her complaint in consequence of its staleness.

We have already seen that the trust in favor of the complainant attached, *sub modo*, as soon as the slaves were transferred by her husband to Sledge, and that it was only necessary to pay or tender the amount due to the latter, to entitle the complainant to an execution of the trust. The case cited from 7 Johnson's Chancery Reports, if authority to the point were necessary, very satisfactorily shows that the complainant may sue.

The decree, in its details, has not been questioned, and seems to us to be most equitable, it therefore results that it must be affirmed, with costs.

Executors of SANKEY v. The Heirs of SANKEY.

1. An executor, by appearing and submitting to account, waives all objection to the citation.
2. A proceeding in the orphans court, instituted by husband and wife, to obtain the share of the wife in the estate, does not abate by the death of the wife; but the settlement may proceed at the instance of the husband as her administrator.
3. The decree, in such a case, must be in favor of the administrator, and it would be error in the court to make distribution thereof among the distributees of the deceased wife. Such distribution could only be made in a proceeding between the distributees and the administrator.
4. No decree can be rendered by the orphans court, unless the infant heirs or distributees are represented by a guardian *ad litem*.
5. The decree must be in favor of the infant, and not of his guardian.

Error to the Orphan's Court of Montgomery.

This was an application for the settlement of the estate of John S. Sankey, deceased.

The record states, that on the 3d January, 1843, application was made for a distribution of the estate by John Elsbury, in right of his wife, the widow of the deceased—whereupon the court cited the executors, James C. Sankey and James B. Stephens, to appear on the 15th February next, and make final settlement.

On that day the executors appeared and moved a continuance, which was granted.

No further proceedings were had until the 17th July, 1843, when Elsbury, in right of his wife, again moved the court, that the executors be required to make final distribution and settlement of the estate, and the court thereupon directed a citation to issue, requiring the executors to file their accounts and vouchers by the 31st instant, preparatory to a final settlement.

On the 7th July, to which day the matter had been continued, James B. Stephens, one of the executors, appeared and filed his accounts and vouchers, and publication was directed to be made, that on the 25th September ensuing, a final settlement would be made. The court then proceeded to state an account against James C. Sankey, and directed publication to be made, that un-

less he appeared and filed his account, on or before the 25th September then next, the account so stated would be made final.

On the day appointed for the final settlement, the executors appeared and pleaded that the plaintiffs ought not further to have or maintain these proceedings, because, since the last continuance of the cause, Patience Elsbury departed this life.

On the 30th October, 1843, the record recites, that John Elsbury, administrator of Patience, his wife, was made a party, and the executors and heirs being present in person and by their counsel, and objections being made by Stephens, one of the executors, to the account stated by the court against him, a jury was empannelled to try the issues between the parties, who found against the executor $989 86, and $41 37 1-2 costs.

The other executor, James C. Sankey, making no objection to the account stated against him, its allowance was decreed and ordered to be recorded.

The court then made the following decree. "There is in the hands of James C. Sankey, executor, the sum of $3,917, which, with the sum of $989 89, due by James B. Stephens, co-executor, amounts to $4,906 86, due said estate, by the said James C. Sankey and James B. Stephens, executors aforesaid. And on motion of John Elsbury, administrator in right of his wife, Patience, for a distribution of said personal estate, and it appearing to the satisfaction of the court, that the said Patience departed this life on the 20th September last, leaving two children minors, Ann Sankey and John Elsbury, and it appearing, that by a decree of this court, made the 15th of February, 1843, the executors aforesaid, were required to deliver over to John Elsbury and wife, Bob, Maria and children, agreeably to the provisions of the last will of the said John S. Sankey, deceased, it is now considered that the said John Elsbury, was in legal possession of the said negroes, before the demise of his wife, and is, therefore, entitled to the same.

And it is also appearing, that by the will of the deceased, Anne Sankey is entitled to the following negroes, viz: Washington, Bellar and Brister, and one hundred and seventy-five dollars, which said sum being taken from the $4,906 80, leaves $4,731 86, one half of which is $2,365 93, to which she is entitled as the legatee of her deceased father, and also the further sum of $1,182 96,

being one half of the heretofore undivided portion of the personal estate of her deceased mother, Patience Elsbury.

It is also considered, that John Elsbury, infant child of the said Patience, is entitled to the remaining half, viz: $1,182 96.

It is, therefore, decreed by the court, that James C. Sankey and James B. Stephens, executors of the last will and testament of John S. Sankey, deceased, deliver over to the legal representative of Anne Sankey, when known, the said negroes, Washington, Bellar and Brister, and also pay over to the said representative when known, the sum of $3,723 89, being her portion of said estate.

It is also ordered and decreed, that the said James C. Sankey and James B. Stephens, executors aforesaid, pay to the legal representatives of John Elsbury, when known, the sum of $1,182 89, being his portion of his deceased mother's estate.

Accompanying the record, is the will of John S. Sankey, deceased.

The following comprise the assignments of error:

1. In directing a citation without the wife being a party to the application.

2. In ordering the executors to deliver to Elsbury and wife the slaves bequeathed to her, there being no rule for a partial division.

3. In not abating the suit on the death of Mrs. Elsbury.

4. In making final settlement, without appointing guardians for the minors.

5. In decreeing to Elsbury the slaves devised to his wife after her death, and before he obtained possession.

6. In settling the estate of Mrs Elsbury and J. S. Sankey, at the same time.

7. In making a decree in favor of persons unknown.

8. In making no decree for costs.

Elmore & Cook, for the plaintiff in error—cited Clay's Dig. 196, § 23, 24; id. 229, § 41; 3 Ala. 653; 4 id. 121; 4 Porter, 332; 2 S. & P. 373; 3 Stewart, 192, 375; 7 Porter, 270.

Hayne, *contra*—relied principally on the fact, that all parties were present, and no exception taken. [7 Porter, 275.]

ORMOND, J.—The supposed error, in issuing the citation to the executors at the instance of the husband, if true, cannot avail. By the appearance of the executors, and submitttng to account, they must be understood as waiving any objection to the citation.

We do not think there was error in permitting the settlement to proceed after the death of the wife, at the instance of her husband, as her administrator. It cannot be doubted that the intention of the legislature was, that no action or suit should abate when the cause of action survived. That it was intended that the act should extend beyond suits commenced in the ordinary mode, appears from the employment of the terms, "plaintiff *petitioner* or defendant." [Clay's Dig. 313, § 1.] But if the case was not within the letter, it is clearly within the intention of the act as the mischief of an abatement from the death of one of the parties, would be quite as great in this proceeding, as in the case of an ordinary suit in a court of common law.

The fact that the administrator of the wife was made a party, had no other influence on the proceeding, than to cause the decree for the share of the wife, to be made in favor of the administrator, instead of being made in favor of the husband and wife, if she had lived. The attempt of the court to distribute the esstate of the wife, upon this settlement of the estate of her former husband, was irregular and void. No judgment or decree could be made on this proceeding, which did not relate to the estate of J. S. Sankey. The estate of Mrs. Elsbury can only be distributed in a proceeding between her administrators and distributees.

It is not necessary, nor would it be proper at this time, to consider the effect or propriety of the decree made by the orphans' court on the 15th February, 1843, by which the executors were required to deliver to Elsbury and his wife, the slaves bequeathed to her. That question will be properly presented on the settlement of his administration of his wife's estate, if her distributees should insist that the slaves were not reduced into possession before the death of the wife.

The court also erred in proceeding to make a final settlement of the estate, without appointing a guardian *ad litem* for Anne Sankey, infant daughter of the deceased, if she had no general guardian.

There was also error in rendering a decree in favor of the future guardian of the minor, to be afterwards appointed. If a

guardian had been previously appointed, the decree should have been in favor of the infant.

The proceedings appear to be regular, down to the ascertainment of the amount in the hands of the executors, the decree of the court only, is therefore reversed, unless the guardian of the minor, to be hereafter appointed, should desire a reinvestigation of the accounts of the executors. The decree of the orphans' court is, therefore, reversed, and the cause remanded for further proceedings, in conformity with this opinion.

DAVIS v. DAVIS, ET AL.

1. The statute requiring the judge of the county court to appoint not less than one day in each month, to hear and determine such cases as are cognizable in vacation, if a decree is made in vacation in such a case, it will be intended that it was rendered at a regular return day, where the record shows nothing to the contrary.
2. Where the parties who are seeking a settlement of the executors by the orphans' court, are described in the record as legatees, their interest is sufficiently shown, though not formally propounded.
3. The act which requires notice to be published, &c. when an executor's account will be reported for allowance by the judge of the orphans' court, is for the benefit of creditors, &c., and an executor cannot object on error that publication was not regularly made.
4. Where several legatees are entitled to recover distinct sums of the executor, the decree should be in favor of each for his share, and not for a consolidated amount in favor of all.
5. It is no objection to a decree of the orphans' court on final settlement of an executor's account, that it authorizes an execution to issue *de bonis propriis*.
6. The statute which requires the execution of a refunding bond, where a legatee petitions the orphans' court for his legacy, does not apply where the executor finally settles his accounts.

WRIT of error to the Orphanss' Court of Baldwin.

The writ of error brings here for revision, a decree which is in the following words:

"The State of Alabama, } Orphans' Court, in vacation. Held on
Baldwin connty. } the 3d day of Feb. A. D. 1841.

This day came Joseph W. Davis, executor of the last will and testament of Benjamin Davis, deceased, and D. R. W. Davis, and

Joseph P. Davis, and Frances M. Davis, and Sarah Ann Davis, by their attornies in fact, the said Joseph P. Davis, and Rachel Ellison and Jennett Johnson, by her attorney in fact, D. R. W. Davis, and prayed the court for a final settlement of said estate. The said executor having made his return and filed his vouchers, the court after examination allows such as are embraced in the account of settlement hereto annexed, marked (A.) from which it appears that the disbursements amount to the sum of fifteen hundred and seventy-five dollars and forty-eight and a half cents, and the receipts to the sum of one hundred and seventy-seven dollars and fifty-five and a half cents. The court orders, adjudges and decrees, that after the receipts be applied in the payment of the disbursements, that the balance be paid by the different legatees, in proportion to their respective legacies. And the same having been agreed upon by the parties, the court orders, adjudges and decrees, that D. R. W. Davis pay five hundred and nineteen dollars, that Joseph P. Davis, Frances M. Davis and Sarah Ann Davis, pay four hundred and eighty-two dollars, that Rachel Ellison pay two hundred and forty-four dollars, and that Jennett Johnson pay one hundred and fifty-three dollars. And it is further ordered, adjudged and decreed, that the said Joseph W. Davis pay to the said Joseph P. Davis, Frances M. Davis and Sarah Ann Davis, the sum of twelve hundred and eleven dollars and thirteen cents, the balance found due, the said legatees, after the payment of their proportion of the debts—and it appearing by the settlement of the said executor and other proofs, to the satisfaction of the court, that the said Joseph W. Davis, executor as aforesaid, has used the legacy and fund of the said Joseph W. Davis, Frances M. Davis and Sarah Ann Davis, it is further ordered, adjudged and decreed, that they receive and recover of the said Joseph W. Davis, interest on the balance due the said Joseph P. Davis, Frances M. Davis and Sarah Ann Davis, from the first day of January, 1838."

Blount, for the plaintiff in error—made the following points: 1. It does not appear that the decree was made at a regular term of the orphans' court, or on a day in vacation, designated according to law. [Clay's Dig. 303, § 31.] 2. The record does not show who were the legatees of the plaintiff's testator, or that they were all in court, either in person or by attorney. [Horn v. Grayson,

7 Porter's Rep. 270.] 3. The accounts and vouchers of the executor, were not presented for examination, statement and allowance, and notice thereof given forty days previous to the rendition of the decree; but the court acted finally, upon the presentment of the accounts. [Horn v. Grayson *ut supra*, Clay's Dig. 226, § 27, 304, § 38.] 4. The judgment is joint in favor of three, instead of ascertaining the sum severally due each. [Clay's Dig. 304, 305, § 42–3–4.] 5. The decree is rendered against the executor in his individunl, instead of his representative character. [Toller's Ex'rs, 264; Hogg v. White's adm'r, Hayw. Rep. 298.] 6. The decree does not require the legatees or distributees to execute a refunding bond. [Clay's Dig. 196, § 23–4.]

No counsel appeared for the defendant.

COLLIER, C. J.—1. In Doe *ex dem.* Duval's heirs v. McLoskey, [1 Ala. Rep 733,] it was held that it would be intended on error, that a decree of the orphans' court was made on a day when the court could have been regularly holden—the reverse not appearing, it must be presumed it was made in conformity to the statute. The decree in the case before us, was made on a day in vacation. and the subject is such as the judge of the county court is authorised to adjudicate out of term time—in fact, by the fifth section of the act of 1821, [Clay's Dig. 303.] he is required by order made in open court, to appoint certain days, "*not less than one day in every period of each month*," for the return of process, and shall then hear and determine such cases as he is competent to hear and determine in vacation. The case cited is an authority to show that the record of a cause when brought here, need not show affirmatively, that the day when the decree was rendered, was thus appointed.

2. The case of Merrill v. Jones, [2 Ala. Rep. 192,] determines, that in all proceedings for the final settlement of a solvent estate before an orphans' court, the parties to the decree must necessarily be the executor or administrator on one side, and the distributees on the other. And in Portis v. Creagh, ex'r, [4 Porter's Rep. 341.] it was decided that it should be shewn at whose instance the settlement of the testator's estate was required to be made—who was the executor, and who claimed to be interested in the will, and in what shares or proportions.

It is inferrable from the decree in the case before us, that the executor and the legatees were parties to the proceedings in the orphans' court, that they voluntarily appeared, the latter moving the court that the estate of the testator might be finally settled, and the executor filing his account and vouchers, that the court might make such settlement. The parties who moved against the executor, do not formally propound their interest, or otherwise state the character in which they ask the action of the court, but the decree shows that they are legatees, and this must be regarded as substantially sufficient. In the absence of any thing in the record from which it can be inferred that there are persons entitled to claim under the will, whose names are not mentioned in the decree, it must be intended that all the legatees were before the court; especially as the contrary presumption, instead of sustaining, would lead to a reversal of the proceeding.

3. It is true, the act of 1806, [Clay's Dig. 226, § 27,] directs that the judge of the county court shall take, receive and audit all accounts of executors, &c. and after examining and auditing them, and causing them to be properly stated, shall report the same for allowance to the next term of the orphans' court: *And further*, that 40 day's notice shall be given, &c. of the time when the account will be reported, &c. [See Taylor and wife, et als. v. Reese, adm'r, 4 Ala. Rep. 121.] In Williamson, et al. v. Hill, [6 Porter's Rep. 184,] this court says, that it is not for an executor or administrator to object, that the notice contemplated by the act cited, was not given; that it was not intended for the advantage of the personal representative, but for the benefit of creditors, distributees, &c. Even if the settlement was not made by consent, this case is a decisive authority to shew that the third objection is not well taken.

4. The act of 1830, enacts that all decrees made by the orphans' court on the final settlement of the accounts of executors, &c. shall have the force and effect of judgments at law, and executions may issue thereon for the collection of the several amounts against the executor, &c. [Clay's Dig. 304, § 42.] And the act of 1832, provides that on such settlement the orphans' court shall insert in its decree the amount of each distributive share. [Id. 305, § 44.] It is clear, that the decree in the present case, is objectionable in being rendered for an entire sum in favor of all of the legatees. This conclusion is deducible from the statutes ci-

ted, and perhaps would have followed independently of them, from the fact that the interest of the legatees is several. It may be supposed that the executor should not be permitted to urge this objection as he is only made liable *in solido* to the aggregate of the sums due each of the legatees. But the decree cannot be sustained by such an argument. If the record of a cause shews that a judgment has been recovered by one in whom the right of action was not vested, the judgment would be reversible on error. Here each of the legatees is entitled to one third of the sum which has been adjudged to the three, and each may be said to have obtained a decree in his favor for a sum two thirds greater than he is entitled to. Neither each, or all of them jointly, have a right to the sum expressed in the decree, and its payment cannot be enforced by the process of the orphans' court.

5. In respect to the fifth point, we think it is entirely regular to render a decree against an executor on final settlement, so as to authorise an execution *de bonis propriis*. He either admits himself, or the court ascertains by evidence, that he has assets in his hands belonging to the testator's estate. Under such circumstances, he is personally liable, either because he has appropriated or otherwise disposed of money or property to which the creditors or other persons interested in the estate, are entitled; and hence a decree which authorises the seizure and sale of the executor's property is obviously proper.

6. It is further objected, that the decree is erroneous, because it does not require the legatees to execute a bond, conditioned to refund in the event of any demands afterwards appearing against the testator's estate. [Clay's Dig. 196.] The statute which requires such a bond to be executed, applies only where a legatee or distributee petitions the orphans' court for his legacy, or distributive share, after the expiration of eighteen months, from the qualification of the executor, or administrator. Where the estate is finally settled, no such requisition is made of the legatee.

We cannot forego the remark that the record in the present case is exceedingly meagre. It does not discover the ground upon which the three legatees who have a decree in their favor are entitled to recover—neither the will, inventory or other paper are found in the transcript to give information on this point. The decree itself wants precision in omitting to affirm the facts necessary to sustain it, and especially in not shewing how the executor

became liable to pay the sum adjudged against him. But these defects are not brought to our view by the assignment of errors.

For the fourth objection made by the plaintiff in error, the decree of the orphans' court is reversed, and the cause remanded.

REPORTS

OF

CASES ARGUED AND DETERMINED,

JUNE TERM, 1844.

BARELLI & MARTIN v. O'CONNER.

1. The rescission of a contract, under seal, cannot be given in evidence under the plea of accord and satisfaction; nor can the acceptance of rent from another as tenant, avoid a lease, unless the fact be pleaded specially.

WRIT of error to the County Court of Mobile county.

Covenant by O'Conner against Barelli and Martin, upon a lease; by the covenants of which, they bound themselves to pay rent on a day certain. They pleaded—1. That they never were possessed of the demised premises. 2. Accord with satisfaction, in this, that the defendants, before the commencement of the action, paid to the plaintiff 175 dollars, in full satisfaction and discharge of the said sum of —— dollars, in the breach of covenant mentioned, which the plaintiff accepted in full satisfaction and discharge of the said sum of —— dollars, in said breach of covenant mentioned.

The plaintiff had judgment upon a verdict; but at the trial, the proof, on his part, was the lease, by which the defendants agreed to pay him 350 dollars for the rent of certain premises for 10 months, at the rate of 33 1-3 dollars fer each month, payable monthly. Martin was principal, and Barelli only security, in the lease.

The defendant then offered a witness in support of his plea. This witness stated that he occupied the house, &c., mentioned

in the lease, during the months of April and May, 1841, (a portion of the time covered by the lease); that he obtained possession from Martin, but paid the plaintiff on the 11th, May 25 dollars, in full of one month's rent to the 1st May, for which the plaintiff gave him a receipt, which was produced, and which stated that the house was held by the witness of the plaintiff. The defendant then offered to prove by the same witness, that Martin was no longer the plaintiff's tenant, by reason that the contract between the parties had been rescinded. The plaintiff objected to this question, on the ground that the evidence of the rescission of a contract under seal, before a breach thereof, must be in writing under seal, and not by parol; and that such evidence would be irrelevant to the issue.

The court sustained the objection, and ruled, that the witness should not make a statement of any remarks made to him by the plaintiff in relation to the rescission of the contract expressed in the lease.

The defendants then requested the court to charge the jury, that if, from the receipt given to the witness for rent, they should be satisfied that the plaintiff had acknowledged him as his tenant, they would be authorized to infer that the plaintiff had taken charge and possession of the premises from Martin, and must find for the defendant. This was refused, and the jury instructed, that they could look to the receipt for no other purpose than as evidence of the payment of money.

The exclusion of the parol evidence and the charge of the court are now assigned as error.

Stewart, for the plaintiff in error, cited 9 Pick. 298; 14 John. 330; 3 Cowan and Hill's Notes, 1479.

No counsel appeared for the defendant in error.

GOLDTHWAITE, J.—The objection to the evidence offered by the defendant, was of a twofold nature: 1st, It was alleged to be incompetent; 2d, It was said to be irrelevant to the issue. The rule of the ancient common law, in Blake's case, [6 Coke 43,] is said to have been, that a contract under seal could not be discharged by one by parol; but at the present day, the proposition is by no means true as a general rule. It has frequently been

held, that a contract under seal will be considered as abandoned and discharged by a subsequent *executed* parol contract. [Monroe v. Perkins, 9 Pick. 298; Le Fevre v. Le Fevre, 4 S. & R. 241; Crisgum v. Nicholson, 1 H. & M. 435, and other cases cited; 3 Cowan & Hill's notes, 1479.] In our own court, the same doctrine has been, at least impliedly, recognized by the case of McVoy v. Wheeler, [6 Port. 201,] where we considered a declaration in covenant as bad which alleged a subsequent executed parol contract for its modification; and, also, that the plaintiff might have his remedy on the new contract. To the same effect is Langworthy v. Smith, [2 Wend 587.]

Perhaps it will appear, whenever it shall be necessary to consider this question as the turning point of a decision, that the true matter of distinction is not whether one contract or the other is under seal, but whether the last one is sustained by a valid consideration. In the present case, therefore, if the defendant's pleas had presented the proper issues, we should not hesitate to hold that the covenants, binding them in the lease, might be discharged by a subsequent valid parol agreement, although it was made before any actual breach of the covenants.

But the plea in this case is, accord and satisfaction of the breaches of covenant declared for, and we cannot well see how evidence of a discharge of the covenants, or the substitution of a new contract between these parties can be given in evidence under the plea. To permit such a practice, would be a departure from well settled rules of pleading and evidence. The same remarks may properly be applied to the refusal of the court to give the charge requested.

It is very possible that the security of the lessor, for his payment of the rent, or for any other breach of the lessee's covenants, would be a virtual abandonment of his action of covenant for rent; but the refusal of the charge is amply sustained by the fact, that there was no issue between the parties under which such evidence was proper or admissible.

Judgment affirmed.

HAWKINS v. GILL.

1. A landlord, upon making the affidavit prescribed by the 2d section of the act of 1843, is entitled to the process of attachment, and it is not necessary that it should be stated that the attachment is not sued out for the purpose of vexing or harrassing the defendant.
2. The design of the act was to make the landlord's *lien* on the crop more effectual; the attachment therefore is properly issued against the crop grown on the land.

ERROR to the Circuit Court of Jefferson.

The plaintiff in error send out an attachment before a justice of the peace, as a landlord, against the defendant as his tenant, upon an affidavit, "that Joseph M. Gill is justly indebted to the said Williamson Hawkins, in the sum of one hundred dollars due from him for the rent of land for the year 1843, and that the said Gill has removed off the premises, to him rented by the said Hawkins, a part of the crop grown upon said land, and is about to remove the residue without having paid the rent for said land." Bond being executed in the penal sum of two hundred dollars, an attachment was issued by the justice, commanding the sheriff to attach "so much of the crop of the said Joseph M. Gill, if to be found, &c. repleviable on security, as shall be of value sufficient to satisfy the said debt and costs," &c.

At the return of the attachment, the court on motion, quashed the attachment from which this writ is prosecuted.

MUDD, for the plaintiff in error.

PECK, *contra*,—insisted that the attachment given in this case, must conform to the general attachment law, and that the affidavit was insufficient, because it did not state that the attachment was not sued out for the purpose of vexing or harrassing the defendant.

ORMOND, J.—The act of 1843, [Clay's Dig, 506,] declares that the crop grown on any rented land, shall not be removed off the premises until the tenant shall pay the rent in arrear, and that if the tenant is removing, or about to remove the crop, or any part

thereof, without having first paid the rent, the landlord shall have "the process of attachment as now provided by law," upon making affidavit, "that the amount sued for is due, or will be due for rent, and the tenant or lessee has removed, or is about to remove the crop off the premises, without having first paid the rent."

We think the whole design of this law, was to give the landlord an efficient means of enforcing his *lien* upon the crop grown upon the land for the rent. The act of 1821, abolishing distress for rent, gives a *lien* upon the growing crop, but provides no means for its enforcement, and to supply this defect, appears to have been the design of the act of 1843; the process was, therefore, properly issued against the *crop* grown upon the land, and should not have been issued against the estate of the defendant generally. The expression in the statute, that the landlord "shall have the process of attachment as now provided by law," did not mean that the landlord should have power to issue an attachment against his tenant, under the existing attachment law, but that for the causes, and upon making the affidavit specified in the statute, he should be entitled to the process of attachment, as allowed by law in other cases. The affidavit made in this case, is in precise conformity with the statute, and if any objection existed to the bond, it was according to our repeated decisions, no ground for quashing the attachment, as it could have been amended in the court below.

We have seen that the object of the law was to make the *lien* given to the landlord on the crop, more effectual; the instruction, therefore, to the officer, to levy the attachment on the crop grown upon the land, was strictly correct.

Let the judgment be reversed, and the cause remanded.

BANK OF THE STATE OF ALABAMA v. CROFT.

1 Where one acquires the possession of slaves under a contract with the owner to pay an equivalent for their services, and restore them to him at the end of the year, a renewal of this contract from year to year, thus continuing the possession of the hirer, without interruption for more than three consecutive years, is not a loan, &c. within the second section of the statute of frauds, so as to subject the slaves to his debts.

WRIT of error to the Circuit Court of Marengo.

This was a proceeding under the statute, for the trial of the right of property. An issue was made up under the direction of the court, and submitted to the jury for trial. From a bill of exceptions, sealed at the instance of the plaintiff, it appears that the plaintiff caused a writ of *fieri facias*, to be placed in the hands of the sheriff of Marengo, against the goods and chattels, &c., of President W. Pearson and Bird M. Pearson, which, on the 22d of November, 1843, was levied on two slaves, viz: Mary and Elsey, as the property of Bird M., and while they were on his plantation. These slaves were claimed by the defendant in error, and a bond executed by him as required by law.

It was proved that the claimant, in 1837, in the State of South Carolina, hired the slaves in question privately to Bird M., for the year 1838; and that they were brought from that State to the plantation of the latter, in Marengo county; and remained in his possession from about the first of January, 1838, to the time they were levied on. The possession of Bird M. was under a contract of hiring, made privately, at his house in Marengo, with the claimant, from year to year. Upon this evidence, the court charged the jury, that if they believed, from the testimony, that the hiring from year to year, by Croft to Pearson, was *bona fide*, and upon good consideration, although there was no actual change of possession for three years or more from Pearson to Croft, that the case did not come within the statute of frauds, and that they should find for the claimant. The jury returned a verdict for the claimant, and a judgment was rendered accordingly.

W. M. Smith, (of Marengo,) for the plaintiff in error, cited Myers v. Peck's adm'rs, 2 Ala Rep. 648; Oden v. Stubblefield, id. 684. See also 4 id. 40.

F. S. Lyon, for the defendant, insisted, that the statute of frauds did not apply to a transaction *bona fide*, and founded upon a valuable consideration; and that the cases cited, did not warrant a different conclusion.

COLLIER, C. J.—In the cases cited by the plaintiff's counsel, we took an extended view of that part of the second section of the statute of frauds, which declares the effect of a three years' continuous possession of goods and chattels under a loan, or where there is a reservation or limitation, &c.; and such loan, reservation, limitation, &c., is not declared by will, &c. It is needless to reiterate either the reasoning or the conclusions of the court in those cases. They were essentially different in their facts, and controlled by a provision of the statute from which the present case is expressly exempted. In all of them, the possession of the property in question had been parted with under circumstances, that showed that there had been a gift, or the absence of a contract founded on a valuable consideration.

In Oden v. Stubblefield, [4 Ala. Rep. 40,] it appears that the slave was in possession of the donee, at the time the deed of gift, reserving a life estate to the donor, was executed. This deed was never recorded. The donor brought an action of detinue against a purchaser from the donee to recover the possession of the slave. Previous to the execution of the deed, the donee hired the slave to a third person at ten dollars a month, and upon the donor's complaining that this was not enough, the donee agreed to pay him two dollars more. Assuming the possession of the donee to have commenced, either under a loan, or a gift with a reservation, we said, "As it respects creditors and purchasers, the actual payment of hire by the donee could not have interrupted the continuity of his possession, and in their favor, if it continued for three years *without demand made and pursued by due course of law*, it would divest the reservation which the plaintiff had made in his own favor." This case is unlike the one at bar; for there, the possession was parted with without any thing, either paid or agreed to be paid—the promise, if it can be so considered, to

pay the donor hire, was a subsequent undertaking, after the statute had began to operate. The statute itself prescribes the terms on which a reservation, &c., shall be preserved as against the creditors, or purchasers from the donee, and a *post factum* arrangement by which hire, or something as an equivalent therefor, is to be paid, cannot have that effect. This can only be done either by reclaiming the possession, or prosecuting a suit with a view to that object; or where the reservation, &c., is shown by deed, &c., causing the same to be recorded upon proof thereof.

The facts of the present case bring it within the third section of the statute, which declares that, "This act shall not extend to any estate or interest in any lands, goods or chattels, or any rents-common, or profit out of the same, which shall be upon good consideration, *bona fide* lawfully conveyed, or assured, to any person or persons, bodies politic, or corporate." [Clay's Digest, 255.] If it be true, as shown by the evidence, that the slaves were hired by the claimant to one of the defendants in execution, from year to year, whether privately or publicly, the case is exempted from the influence of the statute; for then, the possession was parted with for a *valuable* consideration, which has been often held to be the meaning of the terms, "good consideration," as used in the act. This being shown, the inference will be, in the absence of all proof impugning the fairness of the transaction, that it was "*bona fide*." And the possession, having been acquired and retained by the hirer under a contract made annually to pay to the claimant an equivalent therefor, with a stipulation that, at the termination of the hiring, he would restore the slaves to the claimant, the creditors of the former could not divest the title of the latter, by a sale under an execution against the hirer. From this view, it results that the circuit court laid down the law correctly; and its judgment is, consequently, affirmed.

CULLUM v. SMITH & CONKLIN.

1. The circuit court has exclusive jurisdiction of all claims to property levied on, whether the execution issues from that or another court.
2. Although a court may, under peculiar circumstances, suppress a deposition regularly taken, yet the refusal to do so is the exercise of a discretion which can not be reviewed on error.

WRIT of error to the Circuit Court of Mobile county.

Claim by George W. Cullum, to certain slaves levied on by an execution from the county court of Mobile county, at the suit of Smith & Conklin against Charles Cullum.

Upon the return of the claim into the circuit court, the claimant moved to dismiss it on the ground that the court had no jurisdiction, inasmuch as the levy was made upon an execution from the county court. The court refused to dismiss the claim. At the trial, upon an issue formed between the parties, the deposition of one Croker, was offered by the plaintiffs, and objected to by the claimant, upon the ground that the notice given of the time and place of taking the deposition, was insufficient. The facts were, that the witness resided in New-Orleans; the notice was served on the claimant's attorney, on Saturday, about 10 o'clock, that the deposition would be taken in New-Orleans, on the following Monday. The mode of intercourse between these places, is by steamboat, which leaves Mobile each day, between 12 and 2 o'clock, and usually reaches New-Orleans about 8 o'clock the ensuing day. The claimant sent an agent to New-Orleans by the boat of Sunday, but owing to adverse winds, the boat did not reach New-Orleans until after the deposition had been taken on Monday. The deposition was taken in accordance with the commission, and the order of the clerk of the court. The court refused to reject the deposition.

A verdict having been returned, and judgment thereon rendered for the plaintiffs, the claimant prosecutes this writ of error, and assigns that the circuit court erred in refusing to dismiss the claim, and in not rejecting the deposition.

DARGAN, for the plaintiff in error—argued, 1. That the claim

was a proceeding ancillary to the original suit, and should have been returned into and determined by the county court. By the act of 1812, this mode of proceeding is authorised, and the jurisdiction confined to the superior courts. [Aikin's Dig. 167.]—These courts were virtually abolished by the adoption of the constitution, as circuit and county courts are thereby provided. The act of 1807, [Aik. Dig. 246,] gives the county court concurrent jurisdiction with the superior courts, in all matters of a civil nature, under 1,000 dollars, except real actions, actions of ejectment, &c. The act of 1822, extends and makes the jurisdiction of the county court, concurrent with that of the circuit court, in all actions of debt, assumpsit, case, covenant, and trespass *vi et armis*; and it also has concurrent jurisdiction over writs of *certiorari* and *supersedeas*. [Aik. Dig. 246.] This proceeding is given in place of the action of trespass against the sheriff, and as the county court has jurisdiction of that, there is no reason why it should not also have it of a claim interposed. The concurrent jurisdiction has been recognised when the claim was made upon property levied on by an execution from a justice of the peace. [Gregg v. Harrison, 9 Porter, 631.]

2. The injustice of pressing a deposition taken under the circumstances disclosed in the bill of exceptions, is apparent.

CAMPBELL, *contra*.

GOLDTHWAITE, J.—1. The practice, now so generally pursued in this State, of interposing a claim to property, levied on by an execution, instead of an action against the sheriff, for the taking, or against a purchaser under him for its conversion or detention, was introduced by the act of 1812. Although the county court then had jurisdiction over all actions of a civil nature, except real actions, ejectment, and trespass *quare clausum fregit*, when the matter in controversy did not exceed 1,000 dollars, yet the cognizance of these peculiar suits was restricted to what was then known as the superior court. [Laws of Ala. 117, § 17; ib. 310, § 10.] The entire jurisdiction of that court was transferred to the circuit court upon the organization of our State government in 1819. [Clay's Digest, 295, § 33.] Since that period, the jurisdiction of the county court has been made concurrent with that of the circuit court, over actions of debt, assumpsit, case,

covenant, trespass, and assault and battery, without restriction as to amount. [Clay's Digest, 297, § 7.]

It is not contended by the plaintiff in error, that there is any specific grant of jurisdiction over this class of suits, but the argument is, that it is necessary and proper that each court should have jurisdiction of all proceedings consequential upon its own process. This argument would establish too much, as executions can issue from the court of chancery, and it can not be contended that that court could take cognizance of such a suit. [Clay's Digest, 204, § 14.] The orphans' court too, has the authority to issue executions upon its decrees, for the payment of money. That court, it is true, is held by the same judge, and known by the same name as the county court, but it has no connexion whatever with the jurisdiction attaching to the county court proper. The act of 1812, which originated the mode of claiming property, was doubtless intended by its framers to give exclusive cognizance to the superior court, of all cases which should arise under executions from the several courts; and no subsequent legislation seems to have taken this jurisdiction away. It consequently remains with the circuit courts of the present time. The case of Gregg v. Hinson, [9 Porter, 631,] has no influence upon this. There the question was, whether the county court could take cognizance of an appeal from a trial of the right of property before a justice of the peace, and it was held, that jurisdiction over appeals from justices courts, was concurrent in the circuit and county courts.

2. The other assignment of error, applies to the refusal to exclude the deposition. This cannot avail the claimant for the reason that such a refusal is not the subject of revision on error.—We entertain no doubt that a court may suppress a deposition, even when the proceedings leading to it have been entirely regular and formal, if, under the peculiar circumstances of the particular case, injustice to the suitor must necessarily or will probably result from using the testimony thus procured. But such an application, when the proceedings have been regular under the statutes, is addressed to the sound discretion of the court, and should never be allowed when sprung at the trial, inasmuch as its effect then must be, to take the opposite party by surprise.—Whether the improper suppression of a deposition is a matter which can be reviewed on error, when the suppression is had previous to the time of the trial, is not a question now to be con-

sidered, though it is possible the proper course would be, to compel its reinstatement by *mandamus*. Taking the case as shewn upon the bill of exceptions, there was nothing to call for the exercise of the discretionary power of the court, as it was not attempted to be shown that any injustice had been, or would be, the consequence of the omission to attend the examination.

Judgment affirmed.

THE STATE v. CLOUD.

1. The offence of keeping a house of public entertainment for travellers, either in town or country, without first obtaining a license therefor from the county court, is punishable by indictment or presentment, although spirituous liquors be not retailed in the house; but no tax can be demanded on granting a license to keep a house of public entertainment, unless it be in a city or incorporated town or village.

NOVEL and difficult questions from the Circuit Court of Russell.

The defendant was indicted for keeping a tavern without first obtaining a license from the county court.

The defendant demurred to the indictment, which was overruled by the court. Upon the trial, it appeared that the defendant kept an orderly house for the entertainment of such travellers as would stop with him, not in any town, village or city, but on his own farm, in the country, and did not retail spirituous liquors. Upon which the defendant moved for a charge, that it was not an offence for which an indictment would lie; which the court refused; and the jury found him guilty.

THE ATTORNEY GENERAL, for the State.
HEYDENFELDT, *contra*.

ORMOND, J.—It is contended by the counsel for the defend-

ant, that there is no law in force subjecting the defendant to indictment for keeping a country inn, or house of entertainment for travellers. The question depends upon the construction of the different statutes.

The act of 1807, [Clay's Digest, 554,] gave authority to the county court to issue a license to keep tavern, to any one who should be recommended for that purpose, by six or more reputable freeholders of the county, on his paying to the clerk twenty dollars for the use of the county. Bond was required in the penalty of three hundred dollars, with condition to provide good, clean, wholesome diet and lodgings for travellers, and stabling and provender for horses; and the rates of charges were to be regulated by the county court.

This act did not, in terms, make the offence of keeping a tavern without license indictable; but by the act of 1812, persons offending against the act were subjected, on presentment by the grand jury, to a fine not exceeding one hundred dollars; and the clerk of the county court was required to furnish the court with a list of all persons who had obtained tavern licenses within one year preceding. [Clay's Dig. 505, § 10.]

In 1827, an act was passed to raise a revenue, which imposed a tax of ten dollars for a license to keep a house of entertainment in any city or town without retailing spiritous liquors. [Aik. Dig. 410.] This act repeals so much of the act of 1807 as required twenty dollars to be paid on obtaining a license to keep a tavern; and as the act expressly confines the tax to those who obtain license, "to keep a house of entertainment in any city or town," nothing could be demanded of those who obtained a license to keep a house of entertainment in the country.

By the act of 1836, all State taxation was abolished; but the commissioners' courts were authorized to levy a tax for county purposes on the subjects of State taxation.

Thus the law stood until 1843, when an act was passed to raise a revenue, and a tax of fifty dollars laid upon tavern licenses in cities, and ten dollars in a town or village incorporated; the commissioners' court being again authorized to levy a tax, not exceeding thirty per cent. on the subjects of State taxation, for county purposes. [Clay's Dig. 560, § 13, 19.]

From this summary of the legislation on the subject, it appears that no State tax is laid upon licenses to keep a house of enter-

tainment, unless it be in a city or incorporated town or village, and, consequently, there can be no county tax on a country license; but the supervision of the county court over houses of public entertainment, whether in town or country, as a police regulation, is still reserved; and no person has the right to keep a public house for the entertainment of travellers, without first obtaining license from the county court in the mode pointed out by law.

It is a matter of great public concernment, that those who keep houses of public entertainment, should be fit and proper persons, that the persons and property of travellers may be safe—that they should be required to make suitable provision for their accommodation, and their rates be known and fixed. These are matters in which the community have a greater interest than in the tax which may be assessed by the State as the price of the privilege; and in all well ordered communities, has been kept under the supervision of the law. It has been so kept in this State; and we entertain no doubt that the offence of keeping a house of public entertainment, either in town or country, without first obtaining a license in the mode required by law, is punishable by indictment or presentment.

The offence of retailing spirituous liquors without license, is distinct from this. The term, "tavern," according to Webster, signifies a house licensed to sell liquors in small quantities; but he adds, in some of the United States, it is synonymous with inn or hotel, and denotes a house for the entertainment of travellers, as well as for the sale of liquors. Such, in the opinion of the Legislature, is the fact in this State, as in the act of 1807, they are used as synonymous terms. In the last act upon this subject, the tax upon a license to keep a *tavern* in a village, is ten dollars; and in the same section, the tax for a license to retail spirituous liquors is thirty dollars—a discrepancy which could not exist if a license to keep tavern, *ex vi termini*, was an authority to retail spirituous liquors. [Clay's Digest, 560, § 13.]

Let the judgment be affirmed.

SHEPHERD, ET AL. v. NABORS.

1. Where a sheriff justifies the seizure of property under a writ of *fieri facias*, he need not allege that a judgment was rendered in the case in which the execution issued; the production of the judgment may become necessary, where the plaintiff proves that his title is paramount to the lien of the execution.
2. A father, by deed, gave to the heirs born of his daughter's body, a female slave, providing therein that he should retain the slave in his possession during his life, and at his decease that she should be "in full possession of the heirs born" of his daughter: *Held*, that this was a testamentary paper and might be proved as such; and that *all the children to which the daughter gave birth*, might claim an equal interest in the slave and her increase, under the deed as an executory devise.
3. In the absence of proof showing the contrary, the English common law, when consistent with our institutions, will be presumed to be the rule of decision in a sister State.
4. A legatee of personal property cannot maintain an action for the recovery of his legacy, unless the will has been regularly admitted to probate.
5. Where it appears from a bill of exceptions that the plaintiff failed to make out his case, an appellate court will not, at his instance, reverse a judgment rendered against him, because the court expressed to the jury an incorrect opinion upon the law, or gave an erroneous reason for a correct conclusion.

WRIT of error to the Circuit Court of Pickens.

This was an action of trover by the plaintiffs in error, against the defendant, to recover damages for the conversion of a female slave named Silvey. The defendant pleaded, 1. Not guilty.—2. That he was sheriff of Pickens county, and as such, received two writs of *fieri facias*, (which are set out *in extenso*) with the indorsements and returns thereon; these executions are against the goods and chattels, &c. of John Shepherd. From the returns, it appears that they were levied on the third of August, 1841, on a negro woman named Silvey, who was sold on the first Monday in September thereafter, to the highest bidder, for three hundred and eighty-six dollars; and that James Richey became the purchaser. The plea then alleges that Silvey was levied on and sold at the time stated, according to law, as the property of the defendant in the executions; "that these actings and doings are the same with which he is charged in the plaintiff's declaration, and no other;" that Silvey was the property of John Shepherd,

and was then and there liable to satisfy the writs of *fieri facias* set out; and negatives the fact that she was at any time the property of the plaintiffs, &c. To this plea, the plaintiffs demurred, and their demurrer being overruled, they replied; whereupon an issue was made up on both pleas, and the cause submitted to a jury.

On the trial the plaintiffs excepted to the ruling of the court.—It is shown by the bill of exceptions, that the plaintiffs read to the jury an instrument of writing, of which the following is a copy, viz: Know all men by these presents, that I, Robert Moses, of the county of Franklin, and State of Tennessee, have this day, given to the heirs born of my daughter, Winney Shepherd's body, a certain negro girl, named Silvey, about sixteen years old, black complexion, which negro, I, the said Moses, do warrant and forever defend the right of the said negro from my heirs, and from every other person or person, to the said lawful heirs, born of Winney Shepherd's body. Nevertheless, I, the said Robert Moses, doth keep the said negro in my possession my lifetime, and at my decease, the negro is in full possession of the heirs born of Winney Shepherd's body. Witness whereof, I have set my hand and seal, this 8th day of August, 1812.

ROBERT MOSES, [Seal.]

It was proved that Winney Shepherd was living at the date of the instrument, that the plaintiffs were her children; some three or four of them were then born, and the others since that time. Mrs Shepherd survived her father, and some of the plaintiffs were born after his death. The defendant proved, that as sheriff, he levied on the slave in question, under an execution against John Shepherd, the father of the plaintiffs. There was a conflict in the proof, whether the possession of Silvey had been with the plaintiffs or their father, since the death of Robert Moses. The court, among other things, charged the jury, "that the instrument read in evidence, was not of any validity as paper title to the slave in controversy, in favor of the plaintiffs; because—first, under a rule of law, Winney Shepherd had no *heirs* at the time the same was made—and secondly, if the word heirs was to be understood children, it was uncertain, from the face of the instrument, what children were meant; whether such only as were born when it was made, or such also, as should afterwards be

born." The jury returned a verdict for the defendant, and thereupon a judgment was rendered.

J. J. Porter, for the plaintiffs in error.—The plea of justification does not allege that there were judgments in the cases in which th *fi. fa's* issued. [5 Burr. Rep. 2631; 2 W Bla. Rep. 701; 1 Ld. Raym. Rep. 305, 733; 2 Saund. Plead. and Ev. 793; 2 Johns. Rep. 46; 4 Mass. Rep. 232; Gould's Plead. 49, § 2.]—These citations will show that the plea is bad for the defect stated.

The reasons assigned by the circuit judge for determining that the instrument offered in evidence by the plaintiffs, is void, cannot be supported. By the term "heirs," we are to understand children, and not only those born at the time of the gift, or at the donor's death, but all to whom Mrs. Sheppard was to give birth during her life.

The writing in question must be regarded as an executory devise, which may or may not become vested in the objects of the devisor's bounty, immediately upon his death. [2 Bla. Com. 172.] Here the writing, although in form a deed, is in point of law a will. [2 Ala. Rep. 155; Lovelass on Wills, 317; 2 Caro. L. Repo. 595; 2 Nott & McC. Rep. 531; 4 Dess. Rep. 617; 6 Ves. jr. Rep. 385.] The fact, whether Mrs. Shepherd would have children, or when the youngest would be born, were events altogether uncertain, and determine the character of the bequest to be contingent. [2 Ala. Rep. 156; Lovelass on Wills, 325; 1 Russell's Rep. 266; 12 Mass. Rep. 424; 3 Dess. Rep. 550; 5 H. & Johns. Rep. 10; 1 Ves. & B. Rep. 422.]

An executory devise operates in favor of the ulterior devisee, although he be not *in esse* at the time it is made, or at the death of the devisor. [Fearne on Rem. 9—536; Lovelass on Wills, 325; 4 Kent's Com. 269, 284; 1 Eq. Cases Ab. 191; pl. 2; 2 Bla. Com. 172.] This being the case, all the children of Mrs. Shepherd are jointly entitled to the slave Silvey, and the action is well brought.

The counsel also made other points, which the view taken by the court, makes it unnecessary to notice particularly; and cited the following authorities. [Greenl. on Ev. 286–8–9, 325, note 3, ii. iii. iv.; Wigram on Wills, 11, 14; 5 M. & W. Rep. 363; Lovelass on Wills, 275; 3 Hals. Rep. 97; Greenl. Ev. 295, 298; Matthews on Pres. Ev. 44; 2 Stark Ev. 566; Ram. on Wills 49; 8

Porters' Rep. 203; 1 P. Wms. Rep. 233; 1 Brown's P. Cases, 288; 3 East's Rep. 533; 2 Atk. Rep. 582; 7 Taunt. Rep. 362; 2 Dess. Rep. 18–33; Matthews on P. Ev. 45; 12 Wend. Rep. 83; 4 Johns. Rep. 61; Fearne on Rem. 313–4; 1 Vern. Rep. 66; 2 Ves. Sr. Rep. 640; 1 id. 57, 226; 5 id. 849; 6 Munf. Rep. 352; 3 Wend. Rep. 503.]

In answer to an intimation from the court, that the testamentary paper relied on should have been proved as a will, and that for the want of a probate, it could not be used in this action, to entitle the plaintiffs to recover; the plaintiff's counsel cited, 2 Caro L. Repo. 595; 3 Johns. Ca. 283, 5 Cow. Rep. 221.

Huntington, for the defendant.—If the second plea amounts to the general issue, this is an objection which is available only upon special demurrer. [7 T. Rep. 391; 10 Johns. Rep. 289; 2 Stew't & P. Rep. 402.] In this State, special demurrers are abolished by statute.

But if a special demurrer was allowable, still the plea would be good. [2 Leigh's N. P. 1493–4.] Nor was it necessary to defendant's defence, that he should have alleged there was a judgment, or that the *fi. fa.* was regularly issued. [5 Wend. Rep. 170; 16 id. 514.] The case of Burns v. Taylor, [3 Porter's Rep. 187,] does not lay down a contrary rule.

The writing given in evidence, was a covenant to stand possessed to the use of the donor for life, and after his death, the slave in question should go to the children of Winney Shepherd, born at the date of the deed, and living at the donor's death; or such as might be living at the latter period, without reference to the time of their birth; or else to such children as Mrs. Shepherd might give birth to during her life. In either case the deed is void, for the uncertainty and the ambiguity, cannot be explained.—[Greenl. Ev. 340, et post.]

Again; upon the last interpretation supposed, the deed would be void, because there would be a use limited upon a use, in respect to children born after the donor's death. [9 Cow. Rep. 437.] And upon the first and second interpretations of the instrument, there are too many plaintiffs, and for that reason, if no other, the action could not be supported. [12 East's Rep. 516.] If all other objections fail, it is insisted that the deed is void, because it is made to the heirs of a person then living.

COLLIER, C. J.—In Savacool v. Boughton, [5 Wend. Rep. 170,] it was declared to be a settled rule of the common law, that a mere ministerial officer, who executes the process of the court having jurisdiction of the matter, and authorised to issue such process in general, or in certain specified cases, is protected in the execution of such process, if it is regular on its face, and apparently within the jurisdiction of the court issuing it. This case was reviewed by the court of errors, in Parker v. Walrod, [16 Wend. Rep. 514,] and is regarded as a most satisfactory exposition of the law. It is there admitted, that if the want of jurisdiction appear upon the face of the process itself, the officer to whom it is delivered, is bound to take notice of it, and can claim no protection from such process when sued for an act done in executing its mandate. *Further*, the court say that where the plaintiff shows title in himself, derived from the defendant in execution before its lien attached thereon, the execution will not afford a defence to the officer, but to make it available against a stranger, he must connect it with a judgment, and then show that the transfer of the property to the person thus claiming it, was fraudulent and void, as against the creditor who had recovered such judgment. This is stated as the only exception to the rule laid down in 5th Wendell. The cases cited by the plaintiff's counsel, are noticed by the court, and instead of contradicting what is supposed to be the general rule, only determine, that where the plaintiffs shows a title derived from the defendant before the lien of the execution, in order to its invalidity, the plaintiff must produce the judgment.

Whether a case come within the rule, or what has been called the exception to it, is wholly immaterial as it respects the frame of the plea; in neither case is it necessary to allege that the *fi. fa.* was issued pursuant to a valid judgment. The execution, as we have seen, if unobjectionable in itself, will justify the officer in obeying it, and the judgment, when its production is necessary, is only evidence in connection with extrinsic proof, to show that the creditor's right to sell the property was superior to the title which the plaintiff has made out. The judgment is not a primary element in the justification of the officer, and can only be made material by the proof adduced by the plaintiff; therefore, upon principle, the pleadings cannot be required to make any averment in respect to it.

In Dunn and Wife, et al. v. The Bank of Mobile, et al. [2 Ala. Rep. 152] we held, that although an instrument be in form a deed of gift, and so designated upon its face, still if its purpose be testamentary—is not to operate during life, but is not to be consummated until death, it may be proved as a will. So, an instrument, which is in form an indenture, and sealed and delivered as a deed, may, if testamentary in its nature, operate as a will even of real estate; and such paper would be a good execution of a power to appoint by will. [Lovelass on Wills, 317, and cases there cited.] The instrument in question, it is clear, is of the character described; for its operation is expressly postponed until after the donor's death. This being the necessary consequence from the law as stated, the case cited from 2 Ala. Reports, will show, that the gift to Mrs. Shepherd's children was an executory devise, and may take effect in favor, not only of those who were born at the time the instrument was executed, or at the donor's death, but all of whom Mrs. Shepherd may become the mother during her life. The intention of the donor requires that the deed should receive this extended interpretation; for all the children, no matter when born, were related to him in the same degree, and following the dictate of nature, should be alike cherished as objects of his bounty. Now, although *nemo heres est viventis* is a familiar maxim of the common law, it cannot be allowed that a deed or will shall be inoperative; because, in designating the persons who it is intended shall take under it, the term, "heirs," is used as a substitute for children or issue. The rule which requires the intention of the testator, donor or grantor to be carried into effect, where it is consistent with law, utterly forbids such a conclusion. It cannot be maintained that the deed is void because it is uncertain which of the children of Mrs. Shepherd are to take under it. The instrument being testamentary, operates as an executory devise, and that the "heirs" may enjoy the property, all the children must take a joint interest. The difficulty of adjusting the rights of the children will be no objection to this construction; for it would be competent, if necessary to a division, to sell the property: and in order to provide for after-born children, those who come into the possession of their interest, upon the death of Robert Moses, might be required to enter into bond with surety to contribute so as to make up the shares of the younger issue.

The instrument in question appears to have been executed in Tennessee, and from any thing to the contrary, shewn by the record, may have been consummated by the death of the donor while possessed of the slave in that State. We, therefore, propose to consider its legal effect in reference to the English common law, which, in the absence of proof showing it to be inapplicable, must, when consistent with our institutions, be understood to be the rule of decision in a sister State.

It has been said, that a will of real estate, *independently of the requirements of a statute*, does not need a formal probate to give to it efficacy in favor of a devisee; that it operates as a conveyance, *propria vigore*, and like an ancient deed, when possession has been consistent with it for a long time, will be presumed to have been executed in the manner it imports. [Ram. on Wills, 3—4; Bagwell v. Elliott, et ux. 2 Rand. Rep. 190; Fetherly v. Wagoner, 11 Wend. Rep. 519. See, also, 3 Johns. Cases, 283; 5 Cow. Rep. 221; 7 id. 374; 6 Serg't & R. Rep. 223; 1 Har. & McH. Rep. 419; 10 Wheat. Rep. 470; 2 Rep. Const. Ct. of So. Caro. 80; 4 Dev. Rep. 430; 3 Phil. Ev., C. & H.'s notes, 861, 1347, 8.] But the question is not as to the necessity of a probate in order to establish a will of real estate at common law; it is whether the legatee of personal property can recover it at law until the will has been proved in the *forum* provided for that purpose. This question arose in Rex v. The Inh. of Netherseal, [4 T. Rep. 258,] and Lord Kenyon said, "we cannot receive any other evidence of their being a bill in this case than such as would be sufficient in all other cases, where titles are derived under a will; and nothing but the probate or letters of administration with the will annexed are legal evidence of the will in all cases of personalty." This was considered as a correct statement of the law in Armstrong v. Lear, [12 Wheat. Rep. 175,] where it was held, that an administrator appointed here, could not sue for a legacy bequeathed by a foreign will; because, probate of the will had not been made. [And the same doctrine is re-asserted in Tarver v. Tarver, 9 Peters' Rep. 174. See, also, Pinkerton v. Walker, 3 Hayw. Rep. 223; Howell v. Whitchurch, 4 Id. 49; Pinney v. Pinney, 2 Mann. & Ryl. Rep. 436; 8 Barn. & C. Rep. 335.]

It is needless to enlarge upon this point, for it is clear, upon the authorities cited, as well as upon principle, that the plaintiff's can

take nothing under the testamentary paper adduced by them, until it has been admitted to probate as a will. The reasons which induced a decision by the circuit court against the validity of the instrument, we have seen are not well founded in law, yet the result was correct; and the plaintiff's, not being prejudiced, cannot urge an erroneous reason for a correct decision as a ground for its reversal. The consequence is, that the judgment of the circuit court is affirmed.

CHERPIN v. TILLOTSON.

1. It is not regular for a defendant in error to docket the cause upon the production of the certificate and citation, and thereupon move to confess error. Until the record is filed by the plaintiff and errors are assigned, the defendant has no other rights than to move for an affirmance.

STEWART, on behalf of the defendant in error, produced the certificate of the clerk of the circuit court of Mobile county, that a writ of error in this case had been sued out returnable to this term; and also produced the citation issued and served. Upon these, he moved that the case should be docketed, and the defendant allowed to confess error.

GOLDTHWAITE, J.—Until the transcript is filed by the plaintiff in error, and errors assigned by him, the defendant has no other rights in this court than to have the judgment affirmed, upon the production of the proper certificate or citation; or for the omission to assign error.

By the statute prescribing the manner in which writs of error shall be sued out and prosecuted, it is made the duty of the clerk to deliver a transcript of the record to the party applying for the writ of error, or his attorney, to be, *by him*, returned to the first day of the next supreme court. It also provides, that if the record be not filed, or that, if filed, no errors be assigned within the

three first days of the term that an affirmance may be had by the defendant in error. [Clay's Dig. 308, § 13.]

In Thacker v. Myrick, [3 Stewart, 184,] it was held that the defendant in error could not file the transcript, and move for an affirmance for the want of an assignment of error. Since that decision, the practice then established does not appear to have been controverted.

Motion denied.

THE BANK OF MOBILE, HALLETT, ET ALS. v. HALL.

1. A negotiable instrument received before it is due, in payment of a pre-existing debt, is received in the usual course of trade between merchants, and will protect the holder against a latent equity between the original parties, of which he had no notice.
2. A negotiable instrument received from the payee, before maturity, as an indemnity against future loss on a suretyship then existing on the part of the holder, for the payee is not a transfer in the usual course of trade, so as to preclude the maker from availing himself of a latent equity between him and the payee.

ERROR to the Chancery Court of Mobile.

The bill was filed by the defendant in error, who alleges, that in 1835, he purchased certain premises in the city of Mobile from Solomon Andrews, for the sum of $20,000; for which he gave his four several promissory notes, payable in one, two, three and four years, to the order of Andrews, and payable and negotiable in Bank; and that Andrews, by his deed, covenanted that he had a good title, and that the premises were free from incumbaance. That he paid the sum of $6,000, as was due by his first note. That at the time of the conveyance, the property was incumbered by a mortgage, by Andrews to one Pope and others, for the sum of $10,200. That he never knew of the incumbrance until his payment of the first note; and before the second note became due Andrews became insolvent, and absconded. That on the 25th

May, 1837, the premises were exposed to sale under the said incumbrance, and purchased by complainant for the sum of $8,600. which was fully paid.

That in December, 1837, he was served with notice by the Bank of Mobile, that they would move for judgment; by which he was informed that the Bank was in possession of the note given by him to Andrews. payable two years after date, for $5,-750. That he was a director of the said Bank from January, 1836, to December, 1837; and that during that time, the Bank did not come legally into possession of the note; and that Andrews never indorsed or delivered it to the Bank; and that it has never, by discount or otherwise, come legally into the possession of the same; but that W. R. Hallett, the president of the Bank, without the consent of the directors, fraudulently obtained it and the other notes.

He charges, that Hallett knew of the incumbrance and of his equitable defence when he obtained the notes, and prays that an account be taken, that the notes be produced and cancelled, that Hallett be restrained from suing on or negotiating the notes, &c.

The Bank, by its answer, admits that the note of complainant to Andrews was received by it to secure the indebtedness of Andrews to the Bank. That it was received by Hallett, its president, under and by virtue of his duty as presiding officer of the institution; that the note was received on the 30th March, 1837, carried to the credit of Andrews, and checked out by him to pay his bills drawn on H. M. Andrews & Co. of New York, who were in failing circumstances, and shortly after stopped payment; the settlement of the draft of H. M. Andrews & Co. took place the succeeding day; that the whole settlement was spread upon the books of the Bank and submitted to the board, of which defendant was a member; that complainant must have had knowledge of the transaction, as well as of the incumbrance on the property. And for further particulars, adopts the answer of Hallett.

Hallett denies all knowledge of the consideration of the notes, until the publication of defendant on the 22d April, 1837, or of the purchase, or the incumbrance referred to. That he received the notes in controversy under the following circumstances: the Bank had purchased notes, and discounted bills, from said Andrews, drawn on H. M. Andrews & Co. of New York to a large

amount running to maturity; that believing said drafts would not be paid, he obtained from the said Andrews certain notes, complainant's being of the number, which were regularly and properly endorsed to the Bank; that said note was received in payment of that amount of drafts; and that as president of the Bank, he gave an order to said Andrews to have delivered up to H. M. Andrews & Co. the drafts of said Andrews. The notes received of Andrews were placed to his credit on the books of the Bank; he then checked for the amount to be entered to his credit, with which he paid the drafts, and respondent, as president, gave him an order for them. The settlement was entered on the books of the Bank, and the directors expressed themselves satisfied therewith.

That he is the owner of the note for $5,500, due three years after date, which he received by indorsement from Andrews; and at the same time received the notes of two other persons, one for $4,960, and another for $4,720, amounting in the aggregate to $15,180.

That Andrews had sold to the Planters' & M. Bank a lot of ground on which the Bank house now stands, which, being incumbered by a mortgage, the Bank would not pay the purchase money without security; that respondent became the surety of Andrews therefor, and has been compelled to pay the Bank the amount due thereon; and that he received the said note and the others mentioned to indemnify and save him harmless on his said suretyship. That he knew of no defence to the note, or he would not have taken it. Does not admit that complainant did not know of the incumbrance of Pope; but insists, that from the circumstances he must have known it; and at all events that it was duly recorded.

The cause coming on to be heard on the bill, answers and exhibits, the chancellor considered the equity of the complainant to be superior to that of the defendants, and that he had the right to retain out of the purchase money of the land the amount paid by him to extinguish the incumbrance; and directed the master to state an account between the parties.

At a subsequent term, the complainant filed his petition, that one Campfield was the holder, and claimed to be the *bona fide* owner of the fourth and last note executed to said Andrews, and had brought suit thereon; and, thereupon, the court gave permis-

sion to the complainant to file a supplemental bill, making the said Campfield a party; which was accordingly done. Other proceedings afterwards took place not necessary to be here noticed.

From the decree of the chancellor, the defendants prosecute this writ, and assign for error the decree of the chancellor, declaring the notes in their hands subject to the complainant's equity.

Mr. Campbell, for defendants in error, moved to dismiss the writ, upon the ground that the decree was not final, but interlocutory only; but the court overruled the motion; and the cause came on to be heard on the merits.

Phillips and Dargan, for plaintiffs in error, argued:—The Bank acquired the note on the 30th March, 1837; any equity, therefore, which arises from the insolvency of Andrews, did not exist for fifteen days after the transfer; and no equity from the incumbrance arose until the 23d May afterwards. The Bank is, therefore, a *bona fide* holder without notice.

Illegality of consideration is no defence against a *bona fide* holder without notice, unless the statute *ex vi termini* so declares it. [Story on Bills, 213.]

For a considerable time it was considered that if the holder took the bill under suspicious circumstances, or without due caution and inquiry, although he gave the value for it, he was not deemed a *bona fide* holder; but this doctrine has since been overruled. [4 Adol. & E. 870; 10 id. 784; Story on Bills, 216.]

Receiving a note in payment of a precedent debt, or taking it as collateral security, is a taking in the usual course of trade so as to cut off the equities between the parties. [16 Peters, 1; 20 Maine, 176; 21 Wendell, 501; 24 id. 115: 1 Howard, 236.]

As to the right to set up the equity between the original parties, there is a difference between general assignments and those of a specific character such as this. [2 Story's Eq. 480; 7 Wheaton, 56; 9 Pickering, 100.]

Vendor has a *lien*—but he takes a security in the shape of his covenant—does not this operate as a release of the *lien* in favor of a *bona fide* holder? [3 Ala. 302; 13 Peters, 464; 1 Brock. 97; 2 id. 185; 3 G. & J. 425; 5 Yerger, 205; 4 Kent's Com. 153.]

There is no covenant against incumbrances in the deed from

Andrews to complainant, unless it can be implied from the words, "grant, bargain, sell."

As it respects the note held by Hallett, receiving it as an indemnity, was receiving it upon a contract on a sufficient and valuable consideration; and his equity is at least as great as that of the complainant.

CAMPBELL and GIBBON, *contra.* The Bank is not an innocent holder of the note, because Hallett had not the power to discount it; and as the bill of Andrews was worthless, the Bank gave nothing for it.

To establish the right of complainant as against Andrews, whether with or without covenants, they cited 1 Sugden on Vendors, 554; Gilbert's Eq. Rep. 7; 3 Swanstons, 656; 4 Brown's C. C. 394; 1 Vesey, sen. 88; 1 S. & R. 438; 11 id. 246; 3 Mumford, 68; 1 Dana, 303; 2 id. 276; 1 Paige, 215, 9 id. 444; 5 Leigh, 60.

That when Andrews became insolvent, the right to exert this equity arose, and controlled all dispositions by him of the notes to persons having notice of his insolvency. [1 Monroe, 194; 3 A. K. Monroe, 6; 2 Paige 581; 4 Ala. Rep. 21.]

That the fact of notice of the insolvency of Andrews, and that the dealings were upon antecedent debts, deprives the party of the character of a *bona fide* purchaser, and leaves him only the rights of an assignee. [5 Johns. C. 58; 20 Johns. 637; 22 Pick. 243; 13 Wendell, 570; 9 id. 170; 10 id. 86; 12 id. 600; 13 id. 605; 4 Binney, 366; 4 Paige, 215; 1 id. 135; 5 id. 644; 1 Dev. Eq. 106.]

When the question results in an inquiry concerning equities, if that of the defendant is manifestly superior, it is prior; and to relieve it from this, the plaintiffs must attach a mercantile character to the negotiation.

As to the words, "grant, bargain and sell," amounting to a covenant against incumbrancers, see 2 Binney, 98; 11 S. R. 113.

The equity of Hallett's case is settled by the case in 4 Ala. Rep. 38–9.

ORMOND, J.—The notes of the defendant in error, out of which this controversy arises, being payable in Bank, are to be governed by the rules relating to inland bills of exchange; and being transferred by indorsement to the plaintiffs in error before they were due, and without notice of the equity now attempted

to be set up, the only question is, whether the indorsees received them in the usual course of trade.

In Bay v. Coddington, [5 Johns.C. 54,] it was held, that receiving negotiable paper as a guaranty or indemnity against future responsibilities, as an accommodation indorser for the person from whom it was received, was not in the usual course of business or trade. That to be so, it must have been received in payment of an antecedent and existing debt—for cash or property advanced, debt created, or responsibility incurred on the strength and credit of the paper. Since that time, the decisions of the supreme court of New York seem to have vibrated on this question, so that, in the language of Mr. Justice Story, in Swift v. Tyson, [16 Peters, 1.] it is difficult to ascertain what the law of that State is on this subject.—[See Ward v. Howell, 9 Wendell, 170; Rowsa v. Brotherson, 10 ib. 85; Ontario Bank v. Worthington, 12 ib. 593; Payne v. Cutler, 13 ib. 605; Bank of Salina v. Babcock, 21 ib. 490; Bank of Sandusky v. Scoville, 24 id. 115.]

In the case referred to in 16 Peters, this question came before the supreme court of the United States, and it was there held, after a review of all the authorities, English and American, that the receipt of a negotiable instrument in payment of a precedent debt was, in the usual course of trade; and if it was received before it was due, and without notice of an equity between the original parties to it, the holder was not affected by it. Such was the decision, also, in Brush v. Scribna, [11 Conn. 388,] and such appears to be the received doctrine of the English courts.

We agree entirely with the doctrine as thus stated. It appears to us there is no sensible distinction between receiving a bill in payment of a pre-existing debt, and purchasing it with money or property. In either case, the consideration is a valuable one; and all the reasons which apply to protect the holder against latent equities between the original parties of which he had no notice, apply with the same force in the one case as in the other.

This is conclusive as to the note held by the Bank of Mobile. The Bank received the note absolutely and unconditionally in payment of a debt, and relinquished the security thus paid off. The Bank is then a holder of the note, received by indorsement before its maturity, and without notice of the equity of Hall, for a full and valuable consideration, and upon the well established

principles of the law-merchant, is not affected by the latent equity existing between the original parties.

Something was said in argument about the title of the Bank to the note, and the authority of Hallett to act as its agent in obtaining it. It is not a matter of any moment whether Hallett had authority, in the first instance, to make the negotiation with Andrews or not, as his acts, as such agent, have been ratified by the Bank.

Hallett, the holder of the other note, does not stand in the same predicament. He, it appears, was the surety of S. Andrews in a bond for title to a lot of ground, in the city of Mobile, to the Planters' & Merchants' Bank, the lot being incumbered by a mortgage to one Hagan, and that he received the note from Andrews to indemnify him and save him harmless from loss on his suretyship; that he has since been compelled to discharge the incumbrance.

It appears to us, that this note was not received in the usual course of trade between merchants, so as to protect the holder against a latent equity. In the case of Swift v. Tyson, [10 Peters, 1,] already referred to, the court expressed their opinion, that a note received as *collateral security* for an existing debt, is received upon a valuable consideration in the usual course of trade. That point, however, did not arise in the cause, and the expression of an opinion upon it for that reason, was objected to by Mr Justice Catron.

In Cullum v. The Branch Bank at Mobile, [4 Ala. 21,] this court intimated that the taking a note as *collateral security* for the payment of a debt, would not be such a transaction as would shut out the equities between the original parties, but the opinion is expressed, that a new consideration, "such as the discharge of other paper, or of other parties," would produce that result. This point, however, was not involved in that case. Here, when this note was received, there was no debt existing between Hallett & Andrews, but a mere contingent liability on the part of the former, to pay a debt in future for the latter; it was not then received even as collateral security for a *debt* then existing, but was received as an *indemnity* against possible future loss.

No case has been cited, which goes the length here contended for, and it cannot be said with any propriety, that such a transaction is a dealing in the usual course of trade. It will not be con-

tended that Hallett can resist the equity of the maker of the note against his assignor, on any other ground than the actual payment of the security debt, against the payment of which, it was intended as an indemnity; yet, this right to hold the note, discharged from the equities between the original parties to it, if it existed at all, must have attached to it at the moment it was endorsed, and could not depend upon some future act to be performed by the endorsee, and depending for its performance on his volition; otherwise, it might happen that he would collect the note, and never pay the surety debt.

Such being the aspect of the case, and the inquiry into the equity between the original parties being opened, how would the case stand as between them? Upon this point, there can be no doubt. The case of Cullum v. The Branch Bank of Mobile, previously cited, is an authority full to the point, that if the incumbrance was concealed by the vendor at the time of the sale, equity would relieve the purchaser from the payment of the purchase money *pro tanto*, on the ground of fraud, although the incumbrance was of record, and there was a warranty against incumbrances. And further, that when a purchaser with warranty is evicted by a title to which his covenants do not extend, and the vendor is insolvent, equity will restrain him from recovering the purchase money.

This is decisive as to the equity of Hall, whether the warranty of the vendor is against incumbrances or not; or whether the incumbrance was concealed at the time of the sale of the land, which appears to be the true aspect of the case upon the record. Hallett being in no better condition than his assignor, but subject to the same equity, cannot recover on the note.

It results from the opinion here expressed, that the decree of the chancellor must be reversed, as it respects the Bank of Mobile, and the cause be remanded for further proceedings, not inconsistent with this opinion. Costs adjudged in favor of the Bank of Mobile against Hall, and against Hallett and in favor of Hall.

MASSEY v. ROGAN.

1. The defendant was arrested on a bail writ at the suit of W. and escaped from the custody of the Sheriff; afterwards W. sued out an ancillary attachment, which was levied on the same property that had been previously seized under an original attachment issued at the suit of the plaintiff against the defendant: *Held*, that the liability of the Sheriff to W. for the escape, did not disqualify him as a witness at the instance of the defendant, on the trial of the cause commenced by attachment, by the plaintiff; that the objection to the witness went only to his credit.

WRIT of error to the Circuit Court of St. Clair.

This was an action commenced by attachment at the suit of the defendant in error, to recover a sum of money, claimed to be due from the plaintiff for goods, wares and merchandize, previously sold and delivered to him. The defendant pleaded in abatement, the pendency of another suit by attachment, for the same cause of action. To this plea, the plaintiff replied, *nul tiel record*, and concluded with a verification; the defendant rejoined, the plaintiff sur-rejoined; whereupon an issue of fact was joined, and the cause submitted to the jury. On the trial, the defendant excepted to the ruling of the court. The bill of exceptions shows that the sheriff of St. Clair was introduced as a witness by the defendant, to prove some of his official acts in respect to this cause; whereupon the plaintiff's counsel asked him if he was interested in the event of the suit, to which he answered affirmatively. The defendant's counsel then interrogated the witness as to the nature of his intesest, to which he answered substantially as follows, viz: On the 30th June, 1842, F. B. Walker sued out a bail writ against the defendant, under which the witness immediately arrested him, and shortly afterwards he escaped from the custody of the witness. After such escape, on the 19th of July, 1842, Walker sued out an attachment as ancillary to his suit, which was levied on the same property, which had been seized on the plaintiffs attachment. Walker has recovered a judgment in his suit against the defendant. Some other attachments were levied on the same property prior to Walker's, and

if all of them are sustained, the property will not be sufficient to satisfy them and Walker's judgment. Witness supposed that he might be liable to Walker for defendant's escape, but he had no other interest than such a state of things would occasion. The court adjudged, that the witness was incompetent, by reason of his interest, and excluded his testimony.

The jury found the issue in favor of the plaintiff, and assessed his damages; whereupon a judgment was rendered accordingly.

S. F. Rice, T. A. Walker and S. Hinton, for the plaintiff in error, cited Johns. Rep. 256; 5 Stew't & P. Rep. 426; 2 Porter's Rep. 389; 9 id. 126; Greenl. Ev. 434; 18 Wend. Rep. 490; 4 id. 292.

Wm. P. Chilton, for the defendant, cited 1 Salk. Rep. 283; 6 Bing. Rep. 390; Greenl. Ev. 438; 2 Stew't Rep. 17; Minor's Rep. 256.

COLLIER, C. J.—To disqualify a witness upon the ground of interest, it must be shown that he will either gain or lose by the direct legal operation and effect of the judgment, or that the record will be evidence, either for or against him, in some other action. It must be a present, certain and vested interest, and not uncertain, remote or contingent. [Greenleaf's Ev. 434.] In Van Nays v. Terhune, [3 Johns. Cases,] the supreme court of New-York held, that an examination of all the authorities, show the general rule to be, that if a witness will not gain or lose by the event of the cause, or if the verdict cannot be given in evidence for or against him in another suit, the objection goes to his credit only, and not to his competency. [See also, McGee v. Eastis, 5 Stew't & P. Rep. 426; Kennon v. McRea, 2 Porter's Rep. 389.] In Phillips v. Bridge, 11 Mass. Rep. 242,] which was an action against a sheriff for the default of his deputy, the question was, whether the execution had been delivered to the latter in due season; the plaintiff offered the attorney, who issued the execution, as a witness to prove the delivery. The defendant objected to the competency of the witness, on the ground that he would be liable to the plaintiff if the execution was not delivered in due season. But the court held, that his interest was too remote and contingent to disqualify him. It is needless to

multiply authorities upon this point, for they all concur in stating the general principle, and only differ in its application to particular cases. [2 Phil. Ev. C. & H's notes, 94; 3 id. 1514.]

It is clear that a judgment in this case in favor of the plaintiff, could not be used as evidence against the witness on the trial of a suit against him by Walker, for the defendant's escape. We cannot discover that it would have any influence upon the result of such a case, either to fix a liability, or to increase or diminish the *quantum* of damages. True, if Walker's judgment should be satisfied from the proceeds of the property attached, he of course will not have been prejudiced by the escape of the defendant; and the failure of the plaintiff to recover in the case before us, will increase the probability that the judgment will be thus paid. This shows, that the witness had sufficient reason to desire, that the defendant should have been successful in defeating a recovery; yet, as the judgment, however it might be, would not be evidence in an action against him, his interest was not in the event of the suit, but in the question merely. The objection then went to his *credit*, and not to his competency; and consequently, he was improperly excluded.

The judgment of the circuit court is reversed, and the cause remanded.

HUMPHREYS' ADM'R, v. THOMPSON.

1. Where the transcript of the record shows a consent by the defendant, endorsed on the writ, to waive the declaration, and that the endorsement of the cause of action shall be used in place of it, a judgment by default will not be reversed because this consent does not appear from the record to have been proved to the court below. The proper course, if no such consent was given, is to apply to the court below to vacate the entry of consent and thus make the record in accordance with the fact.

WRIT of error to the Circuit Court of Morgan county,

Thompson sued out a writ in assumpsit, against Humphreys, as the administrator of Humphreys, on the 12th of August, 1842. The cause of action indorsed on the writ, is, that it is brought to recover 3,000 dollars for goods. wares and merchandise, sold and delivered by the plaintiff to Carlisle Humphreys, deceased, in his lifetime, and at his special instance and request, in the years 1833 to 1841, in the said county of Morgan, and for so much money paid, laid out and expended by said plaintiff to, and for the use of the defendant's intestate, before his death, and at his like special instance, and request, &c. All of which monies are unpaid.

The defendant accepted service of the writ on the 19th of August, 1842.

By another indorsement on the writ, copied into the transcript, the following waiver appears:

"The defendant waives the necessity of a declaration in this case, and accepts this indorsement in lieu thereof. Circuit Court, September Term, 1842. DAVID C. HUMPHREYS."

At the April Term, 1843, the plaintiff came and proved the acceptance of service, and the defendant made default. An inquiry of damages was made, and judgment rendered on the verdict, ascertaining the amount.

It is now assigned, that the court erred in rendering judgment against the defendant, without any declaration, or without any proof of the supposed waiver.

SILAS PARSONS, for the plaintiff in error.

No counsel appeared for the defendant in error.

GOLDTHWAITE, J.—We think this admission or consent, that the indorsement of the cause of action on the writ, should stand in lieu of a declaration, is not of the same nature as an acceptance of service of the writ, which, according to many previous decisions, is necessary to be proved to the court, and to set out on the record. [O'Neal v. Garrett, 3 Ala. Rep. 276; Rowan v. Wallace, 7 Porter, 171; Norwood v. Riddle, 9 ib. 425.]

The reason for these decisions is, that the party can only be brought before the court by actual service of process, or by some express waiver of it. When once in court, however, in either way, he is there for any purpose incidental to the cause; and

when an act appears of record as performed by him, the same credence will be given to it, as to any other part of the record.

It is the customary course for this court to presume a waiver of the strict rules relating to pleading, when there is a statement that the pleas were taken in short by consent; the fact here shewn, does not differ in principle from what is stated as the usual course of practice. If the written consent, introduced to the record by what purports to be the act of the party, was never made, the proper course is, to apply to the court below to expurgate it, and thus cause the record to conform to the truth.

As the record stands, there is no error.

Judgment affirmed.

A. & W. HUGHES v. CHADWICK.

1. The husband is bound for the contracts of his wife during cohabitation, for necessaries suitable to his degree and station in life, without proof of assent on his part that she should make such purchase.

ERROR to the Circuit Court of DeKalb.

PORTER, for the plaintiff in error—submitted the cause.

ORMOND, J.—The plaintiffs commenced their suit before a justice of the peace, and judgment being given against them for costs, appealed to the county court. Upon the trial in that court, it appeared that the account of the plaintiffs was created by the wife, by the purchase of a calico dress, and there being no proof of any consent by the husband, that his wife should purchase goods on his account, and he being examined as a witness, and denying that he ever gave such a permission to her, the court rendered judgment for the defendant, from which a writ of error was prosecuted to the circuit court, where the judgment of the county court was affirmed.

The husband being under an obligation to provide for the necessary wants of his wife, is responsible for her contracts for ne-

cessary food and clothing suitable to his degree and station in life, so long as they cohabit as man and wife; and cannot by his abandonment of her, impair her right to such support. The wife being under a legal disability to make any contract which shall charge the husband without his consent, his assent is implied, if the articles purchased are necessary for the support or comfort of the wife or her family, and are such as the husband, from his estate and condition in life, may be presumed to assent to the purchase of. The law has been thus understood, ever since the judgment in the celebrated case of Scott v. Manby, [1 Bac. Ab. 488; Baron and Feme, H.]

It does not, to be sure, appear in this case, that the calico dress purchased by the wife, was suitable to the degree and station in life of the husband, nor is there any testimony on this point. The decision of the court appears to have turned upon the fact, that the husband had never given his wife permission to trade on his account, and we may, therefore, assume, that the article of clothing purchased, was not an extravagant expenditure, unsuited to the estate of the husband. Considered, then, as the purchase by the wife of necessary clothing, suitable to the circumstances and condition in life of the husband, he is bound by her contract without any express consent that she should make the purchase. The wife is impliedly in such cases, the agent of the husband, and within the limits above prescribed, he is as much bound by her contracts as if she acted under an express authority.

The circuit court erred in affirming the judgment of the county court, upon the ground stated in the bill of exceptions. It appears that the bill of exceptions taken in the county court, was not signed and sealed during the term of the court, but afterwards, and during the sitting of the circuit court, and upon proof of this fact, and that neither the defendant or his counsel had consented to it, and "that the same had been made part of the record illegally," the circuit court disregarded the bill of exceptions.

In the case of Weir v. Hoss and wife, at the present term, we considered the power of the appellate court, to suppress a bill of exceptions, and we then held that it could only be done when the bill had been surreptitiously or fraudulently obtained.

Nothing of that kind appears in this case. The only reason assigned by the court for suppressing the bill of exceptions, is, that the bill was not sealed during the term of the court at which

the exception was taken, but afterwards, and whilst the cause was depending in the appellate court. This, according to previous decisions of this court, the Judge trying the cause had the right to do, if he retained a sufficient recollection of the point reserved to enable him to certify it, and that the bill when so signed and sealed, became a part of the record. [See the decisions referred to in the case last cited.] The circuit court, therefore, erred in supposing that the bill of exceptions was not a part of the record, it not appearing that it was fraudulently obtained.

Let the judgment be reversed, and the cause remanded.

THE STATE v. ESTABROOK.

1. Although the charter of the city of Montgomery provides that retailers who procure a licence from the city council shall be exonerated from paying any thing to the county for the privilege of retailing in the city, yet it does not relieve them from the necessity of obtaining a licence from the county court as required by the acts of 1835 and 1839.

On points referred from the Circuit Court of Montgomery.

The defendant was indicted for retailing spirituous liquors in less quantities than one quart, without having first obtained a licence for that purpose, from the county court of Montgomery.—The cause was tried on the traverse of the defendant, the jury found a verdict of guilty, a fine of thirty dollars was imposed, and a judgment was rendered for that sum and costs.

It was proved that a licence was granted on the 9th of October, 1843, by the city council of Montgomery, to a firm of which the defendant was a partner, authorising them to retail spirituous liquors within the same, for the space of nine months: *Further*, that the firm did retail spirituous liquors in Montgomery, after they received the licence. The question referred to this court, is, whether the licence from the city council, authorised the defendant to retail in the manner shown by the proof.

N. Harris, for the defendant—cited the thirteenth section of the act incorporating the city of Montgomery, and insisted that it rendered a licence to retail, from the county court, unnecessary; and it was not repealed by the revenue law of 1843. [Clay's Dig. 560. See also, Pamphlet Acts, 1837, p. 58.]

Attorney General, for the State—contended that the provision of the city charter relied on by the defendant, was impliedly repeated by the revenue act of 1843; and whether this were true or not, the charter did not relieve a retailer from the necessity of obtaining licence from the county court to retail within the city. It only exonerated him from paying any thing for the privilege; besides, the licence produced was for less than twelve months, and is consequently irregular.

COLLIER, C. J.—The act of 1835, requires every person who shall desire to obtain a licence to retail spirituous liquors in this State, to produce to the county court of the county, in which he proposes to obtain a licence, the recommendation of six reputable freeholders or householders, resident within the same, and within five miles of the applicant, and enter into bond with surety, to be approved by the court, and pay thirty dollars, &c.—[Clay's Dig. 556, § 18.] By the act of 1839, the form of the recommendation is prescribed, and it must affirm that the persons who make it, believe that the applicant is "an individual of unblemished moral reputation." And it is further provided, that no licence shall thereafter be granted at any other time, than at the regular terms of the county court, "and that no such licence shall be granted for a longer or shorter time than twelve months from the date thereof."

The thirteenth section of the act "to incorporate the city of Montgomery," enacts, "that retailers of spirituous liquors, who may procure a licence from said city council of Montgomery, shall be exonerated from paying any thing to the county of Montgomery, for the privilege of retailing in the city aforesaid."

We think the recital of these several enactments, show quite as clearly as any argument or illustration that could be employed, that a licence to retail, granted by the city council of Montgomery, does not confer that privilege within the city, until the party has also obtained a licence from the county court, in the

manner the statutes prescribe. The object of the provision was doubtless two-fold, to give to the council the power of restraining to some extent, the sale of spirituous liquors within the limits of the city, as well as the revenue derivable from the sale of licences. But there is nothing in the language employed, or in the subject matter, to warrant the conclusion that it was intended to relinquish the control of the county court over the business of retailing within the city. That court is made to some extent, the conservator of the morals of the county, and the checks provided by the acts of 1835 and 1839, must be considered applicable to the case before us—the legislature only relinquishing the price which was to be paid to the county for a licence.

In this view, it was necessary to the protection of the defendant, that he should have obtained a licence from the county court for the space of twelve months. Having attained this conclusion, we need not consider the effect of the thirteenth section of the revenue law upon the privilege granted to the city by its act of incorporation [Clay's Dig. 560.] But we may remark that there is nothing in the charter to restrain the legislature from imposing a tax upon the retailers of the city; and if a general law has been enacted upon the subject, we cannot very well conceive why the retailers of Montgomery should be exempted from its influence.

Our conclusion is, that in the point referred, there is no error, and the judgment is thus far affirmed.

WETUMPKA AND COOSA R. R. COMPANY v. COLE.

1. Where process against a corporation is returned as served upon one being president of the corporation, it is necessary that proof of his official character should be made to the court, and so appear on the record, to sustain a judgment by default.

WRIT of error to the Circuit Court of Autauga County.

GOLDTHWAITE, J.—The only matter assigned for error, is, that a judgment by default was rendered, and the record does not show that the defendant (the Rail Road Co.) was before the court by service of process or by voluntary appearance. The sheriff's return is, that the writ was served on John Duncan as the president of the corporation; but there is no proof in the record, that he sustains that relation to the company.

It was held in the Planters' and Merchants' Bank of Huntsville v. Walker, [Minor, 391,] that the sheriff's return of service upon one as cashier, was not sufficient to sustain a judgment by default, without proof that he was such officer. The practice thus settled at an early day, has never, that we are aware of, been departed from. In a more recent case, [Lyon v. Lorant, 3 Ala. Rep. 151,] the same rule was applied, where the return was of service upon one as the mayor of a municipal corporation; and a decree in chancery was reversed, because there was no proof in the record, that this person was the officer the return represented him to be.

The judgment must be reversed, for the omission to show upon the record, that the person served with process, was at the time, the accredited officer of the corporation.

Reversed and remanded.

WILLIAMS' Ex'rs v. TEMPLE, Adm'r.

1. Heirs or distributees are not competent witnesses for the executor or administrator to establish a claim in favor of the estate, although they execute releases of all their interest in the demand in suit.

Error to the Circuit Court of Montgomery.

The action was by the defendant in error, to recover a debt due her intestate, and to establish her claim, was permitted to introduce as witnesses, two of the heirs and distributees of the in-

testate, upon their executing releases to her, of all their interest in the particular demand.

FAIR, for the plaintiff in error—cited Green. Ev. 437–8, and note; 4 Cam. 27; 6 Bing 394; 2 Y. & J. 426; 2 Mason, 181; 3 id. 378; 7 Cowen, 64; 2 Ala. 58.

ORMOND, J.—The witnesses were clearly incompetent to testify, from interest in the event of the cause, as is fully shown by the cases cited. If a recovery is had in this case, it will be a fund in the hands of the administrator to pay debts, and thus increase the fund in which they have a distributive share. If it goes against the administratrix, she must pay costs, and thus diminish the fund of which they are distributees. To this effect are the cases of Sims v. Scott, 2 Ala. Rep. 58, and Maury, adm'r v. Mason's adm'rs, 8 Porter, 211. The last are expressly to the point.

The interest, therefore, was such as from its nature, they could not release.

Let the judgment be reversed, and the cause remanded.

ABERCROMBIE v. HALL.

1. Where a defendant, against whose estate a writ of *fieri facias* is sued out, dies after the same has been injoined, his lands are not subject to levy and sale under an execution issued after his death, upon the dissolution of the injunction. The act of 1835 "to authorise the issuing of executions in certain cases, and for other purposes, does not apply to such a case.

WRIT of error to the Circuit Court of Talladega.

This was an action of trespass, at the suit of the plaintiff in error, brought as well to try titles to certain lands described in the indorsement on the writ and in the declaration, as to recover damages for the occupancy and detention of the same. The

cause was tried upon the *general issue*, a verdict returned for the defendant, and judgment thereon rendered.

On the trial, a question of law was reserved by bill of exceptions, at the instance of the plaintiff, which may be thus stated; James Hall, the husband of the plaintiff, became a surety of Gideon Riddle, in a bond for a writ of error to revise a judgment recovered against him by Knox & Co.; the judgment was affirmed against Riddle and sureties, and an execution issued against their estate jointly. Riddle, thereupon, applied for and obtained an injunction, and entered into bond with surety, for the successful prosecution of the suit in chancery; pending the injunction, Hall died. Afterwards, a *fieri facias* issued against Riddle and his sureties, in the writ of error and injunction bonds, under which, the lands in question were sold; the plaintiff became the purchaser, and received the sheriffs deed. It was shown that James Hall was in possession of these lands when he became the surety of Riddle, and so continued up to the time of his death; and that the defendant, as his devisee, had occupied them ever since that event.—The court charged the jury, that the proof did not make out a case which entitled the plaintiff to recover.

S. F. Rice, for the plaintiff in error—cited Clay's Dig. 202, § 5; 205, § 17; 206 and 207, § 28 and 29; 2 Ala. Rep. 734; 4 id. 321–4, 405; 5 id. 58, 199, 433; Tidd's Practice, 1028; 4 Com. Dig. 249 (F); 9 Mass. Rep. 14, 160; 6 id. 149; 3 Porter's Rep. 25.

Wm. P. Chilton, for defendant.

COLLIER, C. J.—In Lucas v. Doe *ex dem.* Price, [4 Ala. Rep. 679,] we held, that where an original *fieri facias* was issued in the lifetime of the defendant, and returned unexecuted, an *alias* or *pluries fi. fa.* issued after his death, will not authorise the levy on, and sale of, lands of which the defendant died seized.—That "by the death of the defendant, his lands descend to his heirs, or vest as he may devise by will, and the mandate of an execution which directs the sheriff to make of them the amount of a judgment, must be wholly inoperative and void. In fact, such a writ could never be executed in consequence of the death of the defendant, which has cast his estate upon other proprie-

tors." In Mansony and Hurtell v. The U. S. Bank and its assignees, [4 Ala. Rep. 735.] the same question is largely considered, and the same conclusion intimated in no equivocal terms.

These decisions, it would seem, should be regarded as conclusive of the case at bar; but the counsel for the plaintiff, insists that the act of 1835, "to authorise the issuing of executions in certain cases, and for other purposes," was entirely overlooked in their consideration, and leads to a different conclusion. That statute, so far as it is necessary to notice it, is merely declarative of the law, and was intended to remove the doubts of professional men, by enacting, that where an execution issues within a year and a day after the rendition of a judgment, it shall be lawful at any time thereafter, to issue execution on such judgment without suing out a *scire facias* or other process to revive the same. This enactment is so indicative of its own meaning as not to require the aid of construction. It was not intended to remove the influence of the death of the defendant upon the right to sue out execution in any case. But its purpose was to declare, that where the plaintiff has caused execution to be regularly isued upon his judgment, the judgment shall not lose its vitality by lapse of time only, but an execution may be sued out thereon, at any subsequent period.

If it is necessary to sell the lands of a deceased defendant, and the executor or administrator neglects to apply for an order for that purposse, the statute authorises a judgment creditor to subject them to sale by prosecuting a *scire facias* according to its directions. [Clay's Dig. 197, § 27.]

Our conclusion is, that the judgment of the circuit court must be affirmed.

WINSTON, ET AL. v. MAJORS, ET AL.

1. A note promising to pay 193 50-100 dollars, in four instalments of 6, 12, 18 and 24 months, may be put in suit before a justice of the peace, when one instalment only is sued for.

WRIT of error to the Circuit Court of De Kalb county.

Winston and the other plaintiffs sued the defendants before a justice of the peace, and after judgment, the latter appealed to the circuit court, where the plaintiffs filed their declaration, setting out that the defendants were indebted to them by a promissory note, dated 27th March, 1843, whereby they acknowledged themselves to be indebted to the plaintiffs in the sum of 193 50-100 dollars, to be paid in four equal instalments: one-fourth in six months; one-fourth in 12 months; one-fonrth in 18 months; and one-fourth in 24 months—and alleging that the first instalment was due and unpaid, and was alone sought to be recovered.—The defendants pleaded to issue; but when the note was produced and read to the jury, the court withdrew the cause from the jury, and dismissed the suit for want of jurisdiction. This is now assigned as error.

T. A. WALKER, for the plaintiff in error, insisted that the action was properly instituted, and within the jurisdiction of the court. The first instalment only was due, and this is less than 50 dollars. [Lightfoot v. Bank at Decatur, 2 Ala. Rep. 345.]

Under the circumstances, it was improper to arrest the suit from the jury without a verdict. [Minge v. Curry & Co. 4 Ala Rep. 168.]

GOLDTHWAITE, J.—It is said in the books that assumpsit is the appropriate remedy to recover money promised to be paid in instalments, when the whole debt is not due. [2 Saund. 303, n. 6.]

It has also been decided, that an action of debt cannot be maintained on a promissory note payable by instalments, until the last day of payment be passed. [Rudder v. Price, 1 Hen. Black. 547.] The present case is not open to the technical objection, that the statement of the cause of action is in debt rather than assumpsit, because the suit was commenced before a justice of the peace; and, therefore, in the circuit court, the plaintiff was entitled to recover according to his right. The instalment of the debt due when the action was commenced, was less than fifty dollars; consequently the justice, and through him the circuit court, had jurisdiction without reference to the form of the state-

ment. But that, if referred to, is as much in assumpsit as debt; and the defendants here pleaded non-assumpsit to it. We consider the action of the court erroneous in arresting the suit from the jury and dismissing it.

Judgment reversed, and cause remanded.

POLLARD, ET AL. v. MURRELL.

1. A covenant to sue certain persons to insolvency, does not require a suit to be brought, if the person to be sued absconds from the State, and in such a case proof of the insolvency of the party will be sufficient.
2. To establish the fact of insolvency under this covenant, it is not necessary to do more than to exhaust the usual remedies provided by law for the collection of debts—it is not necessary to sue out a *ca. sa.* since the passage of the act abolishing imprisonment for debt—or to proceed against the sheriff for a false return.
3. An allegation in a bill in chancery that a person had been sued to insolvency, is not established by proof that he had left the State insolvent.

ERROR to the Chancery Court of Mobile.

This bill was filed by the defendant in error, to foreclose a mortgage executed by Pollard to Murrell, to secure the payment of a note executed by Edwin Haniman to Joseph Bates, by him endorsed to John Pollard, and by him to the defendant in error. The mortgage contains a proviso, that the mortgagee "shall be debarred from his remedy on the mortgage, until he shall have sued Haniman & Bates to insolvency." The bill alleges that Haniman & Bates have been sued to insolvency.

The proof by the sheriff shows, that he returned an execution against Bates, in favor of Murrell, no property found—and that he was reputed to be insolvent. That Haniman had left the State, notoriously insolvent. Proof was introduced by the defendants, to show that Bates was solvent, and able to pay the amount of the note.

The chancellor considering the allegations of the bill to be proved, made a decree foreclosing the mortgage, and ordering a sale of the lands. To revise this decree, this writ is prosecuted.

DARGAN, for plaintiffs in error.—There is no evidence that any suit was brought against Haniman, nor any sufficient proof of any suit against Bates, which could only be established by the record. The insolvency of Bates & Haniman, is not established by the return of the sheriff, of no property found, as the proof shows that Bates is able to pay, and the presumption is, therefore, repelled. [19 Johns. 345; 1 Bay, 69; 2 Porter, 401.]

GIBBON, *contra.*—The proof shows that Haniman left the State insolvent, and that Bates has been sued to a return of no property, by the sheriff. If the evidence of the suit against Bates was considered insufficient, from not being the best evidence in the power of the party to produce, it should have been objected to in the court below.

ORMOND, J.—By the covenant in the mortgage, Murrell undertook to sue Haniman and Bates to insolvency, before he resorted to his right of enforcing the mortgage on the land. The meaning of this certainly is, that he shall exhaust the ordinary legal remedies provided for the collection of debts before proceeding on his mortgage. In Trotter v. Crockett, [2 Porter, 410,] it was held that judicial insolvency could only be ascertained by issuing a *capias ad satisfaciendum.* At the time that decision was made, a *ca. sa.* issued as a matter of course, upon the request, or by the direction of the plaintiff, but by the act passed February 1, 1839, to abolish imprisonment for debt, this process cannot issue but in certain cases, and not then, without an affidavit, which it may not be in the power of the party to make.—Nor is it necessary that proceedings should be instituted against the sheriff, to ascertain whether his return is not false; all that was contemplated by the covenant was, that a suit should be instituted against Bates & Haniman, and the usual process of the law resorted to, to recover the debt.

If, however, it was impossible to sue one or both the parties, from his removal from the State, his insolvency could be ascertained in some other mode, and such an allegation would dis-

pense with the necessity of proving that a suit had been brought. Such has been our interpretation of the statute, defining the remedy on assigned notes and obligations. That, although the act requires the maker to be sued to the first court after the note falls due, to hold the assignor responsible: yet, if from the absence of the maker from the State, the suit cannot be brought against him, it would be dispensed with. [Woodcock v. Campbell, 2 Porter, 456.] When parties within this State, stipulate that a suit shall be brought, they must be understood as referring to our own tribunals, and if this becomes impossible, without the act of the party who is to bring the suit, he is discharged from the performance of the covenant. The meaning of the covenant is, that he will bring the suit if in his power to do so; it is not an undertaking to do so at all events, as a condition precedent to his right to recover on the mortgage.

It is alleged in the bill, that suit was brought against Haniman, and that he was prosecuted to insolvency, and in our opinion, this allegation is not sustained by proof that he absconded from the State insolvent, and that suit could not, therefore, be brought against him. If the prosecution of a suit became impossible from the absconding of the person to be sued from the State, the fact should have been stated as an excuse for not suing. This has been the decision under the act of 1828, regulating the liability of endorsers of paper not mercantile, before referred to, which is precisely analagous to this covenant. This is not like the case of an averment in a declaration on a bill of exchange, of due notice of its dishonor, which would be satisfied by proof against the maker, that he had no effects in the hands of the drawee, because his knowledge of the fact, is notice.

In regard to the sufficiency of the proof against Bates, we consider the answer of the counsel for the defendant in error, as conclusive. The record of the suit against Bates, was the best evidence of the fact, that a suit had been brought, and this the party had a right to insist on, but if he permitted inferior testimony of the fact to be given in evidence in the court below, he must be understood as waiving all objection to it on that score, and cannot make it here. This has been repeatedly held by this court, and the rule is the same in equity as at law. The injustice of permitting the objection to be made here, will be apparent when we consider, that if it had been made in the primary court, it could

have been immediately removed by the production of the record, and probably was not made for that reason.

The decree of the chancellor is reversed, and the cause remanded, that the complainant may obtain leave to amend his bill, if he thinks proper to do so.

TURNIPSEED v. THE STATE.

1. An indictment upon the statute, which charges both the *cruel* and *unusual* punishment of a slave, is not bad, for duplicity.
2. Although the stutute declares in general terms, that "No cruel or unusual punishment shall be inflicted on any slave," yet it is not enough that an indictment should merely pursue the words of the act; but it should allege what punishment was inflicted, and how.

WRIT of error to the Circuit Court of Pickens.

The plaintiff in error was indicted by the grand jury of Pickens for having inflicted, "on a negro woman named Rachel, a slave, the property of him, the said Turnipseed, cruel and unusual punishment, against the peace and dignity of the State of Alabama." The accused traversed the indictment, and was tried by a jury, who returned a verdict of guilty, and assessed a fine of fifty dollars against him; for which sum, as well as the costs of prosecution, a judgment was rendered.

L. CLARK, for the plaintiff in error, made these points:—

1. The indictment is double in charging the infliction of punishment both *cruel* and *unusual*. To punish cruelly is one offence, and unusually is another; and they should have been so charged.

2. The indictment is too general: it should have stated what and how the punishment was inflicted. [4 Port. Rep. 413.]

ATTORNEY GENERAL, for the State. The first objection to the

indictment is not well taken. [State v. Murphy, at this term; Commonwealth v. Eaton, 15 Pick. Rep. 273.] It is enough, and in fact the safest course to charge the offence in the words of the statute, where, as in this case, it was created by an act of the Legislature. [State v. Brown, 4 Porter, 413; State v. Briley, 8 id. 472; State v. Saunders, 9 id. 326; State v. Duncan, id. 260; State v. Click, 2 Ala. Rep. 26; Archb. Crim. Plead. 52.]

COLLIER, C. J.—The first section of the sixth chapter of the penal code declares that, "No cruel or unusual punishment shall be inflicted on any slave, and any master, or other person having charge of a slave, who shall be guilty of inflicting such punishment, or authorizing, or permitting the same, shall be subject to indictment therefor, and on conviction thereof, be punished by a fine not less than fifty, and not exceeding one thousand dollars; and in addition thereto, be required to give security for his good behavior for the space of twelve months. [Clay's Dig. 431.]

It is certainly a *general* rule, that the defendant cannot be charged, in one count of an indictment, with two distinct offences. [Archb. Cr. Plead. 17, 63; Commonwealth v. Symonds, 2 Mass. Rep. 163.] Yet it is not believed that the indictment in the case at bar is obnoxious to the objection of duplicity. True, the statute makes two offences, or rather does not require that the punishment inflicted upon a slave shall be both *cruel* and *unusual* to subject the offender to its sanctions: it is enough if the proof show it to be either the one or the other. To punish cruelly is one, and unusually is another breach of criminal law.—The statute, it is apprehended, does not use the epitheths as synonymous, nor in contrast with each other; but it was merely intended to make the enactment sufficiently broad to embrace a high offence against good morals, no matter under what circumstances committed. *Cruel*, as indicating the infliction of pain of either mind or body, is a word of most extensive application; yet every cruel punishment is not, perhaps, unusual; nor, perhaps, can it be assumed that every uncommon infliction is cruel. But be this as it may, there may be punishment that is both cruel and unusual; thus, if a slave should be punished, even without bodily torture, in a manner offensive to modesty, decency and the recognized proprieties of social life, the offender would be charge-

able in the broad terms employed in the indictment. An offence, committed under such circumstances, might be charged according to its true character, without subjecting the indictment to the imputation of duplicity; and upon conviction, the accused would be liable to but one penalty.

Thus, in Rex v. Benfield, [2 Burr. Rep. 980,] the defendants were charged with singing and publishing divers scandalous, obscene and libellous songs; the court held, that several songs being published at the same time, constituted but one offence, although the publishing of any one of them would be an offence. [See, also, Rex v. Horne, Cowp. Rep. 672.] In The Commonwealth v. Eaton, [15 Pick. Rep. 273,] it was objected to the indictment, that it charged that the defendant "did unlawfully offer for sale, and did unlawfully sell," one-half of a lottery ticket. The court said, "It is true, that an offer to sell, without selling a ticket, is an offence by statute; but an offer to sell and actually selling is but one offence. A sale *ex vi termini* includes an offer to sell."—[See, also, 1 Hale's P. C. 560; Rex v. Crowther, 5 Car. & P. Rep. 216; Rex v. Holden, 1 Russ. & Ryan's Rep. 154.] This view of the law may suffice to show that the indictment is not bad for duplicity.

In respect to the second objection to the indictment, it was said, in The State v. Brown, [4 Port. Rep. 413.] that, "it is not always sufficient to pursue the very words of the statute, unless by so doing you fully, directly and expressly allege the fact, in the doing or not doing of which the offence consists." So it was held, in The State v. Duncan, [9 Porter's Rep. 260.] that "where a statute is introductive of a new offence, and prescribes its constituents without reference to any thing else, in an indictment founded upon it, it is enough to describe the offence in the terms of the act." And the law was laid down in equivalent terms in The State v. Click, [2 Ala. Rep. 26.] True, in The State v. Briley, [8 Porter's Rep. 474,] it was said, that in an indictment on a statute, "all that the law requires is a description of the offence in the words of the statute creating it. The only exception that is known to exist to this general rule, is, where a statute makes use of a technical term known to the law; as burglary, robbery, &c." This language is not to be understood as an expression of an abstract opinion of universal application; but it must be taken in reference to the case then before the court. There, the indict-

ment was founded upon a statute, which did not merely designate an offence, but characterized it by prescribing its constituents. As applied to such an enactment, the remark of the court was clearly correct.

Hawkins says, that in charging a statutory offence, it is not "always sufficient to pursue the very words of a statute, unless by so doing, you fully, directly and expressly allege the fact in the doing, or not doing whereof the offence consists, without the least uncertainity or ambiguity." Thus it has been adjudged, that an information on the statute of *Henry the Sixth*, for not abating so much of the price of wine sold as the vessels wanted of the statute measure, is insufficient, if it did not expressly show how much they wanted. So an indictment on the statute against usury, should not merely allege that the defendant took more than the interest allowed by law; but it should be explicitly shown how much was taken.

In the present case, the statute merely denounces the cruel and unusual punishment of a slave as a public offence, and prescribes the punishment. It does not declare with particularity what are its elements; and consequently, in framing the indictment the statute affords but little aid. Under such circumstances, recourse is to be had to the rules of pleading in criminal cases. According to these, the general terms in which the charge is made against the defendant, is not sufficient; but it should be alleged what punishment was inflicted and how, that the court might judge whether the accused should have been put upon his trial; that he may know what he is to defend against, and the jury know how to apply the evidence.

This brings us to the conclusion that the indictment is defective, because of the generality of the terms in which the defendant is charged. We regret the necessity imposed on us, of reversing the judgment in this case, upon an objection taken after conviction, where the defect complained of, could scarcely have operated prejudicially to the defendant. But we must hold the scales of justice in *equipoise*, and however odious the offence, we must admeasure right to every one according to law.

The judgment of the circuit court is reversed, and the defendant is directed to remain in custody to abide further proceedings, unless he shall be otherwise discharged.

BATES v. RYLAND.

1. The consent of the endorser of a note not payable in Bank, that suit may be delayed against the maker, does not discharge the other statutory condition requiring that the maker shall first be prosecuted to insolvency.
2. Where a creditor on account of his debt, accepts the note of a third person from, and endorsed by his debtor, the creditor, upon its dishonor, is entitled to declare either on the endorsement or for the precedent debt; but in either case he is bound to shew the same degree of diligence.
3. The statutory condition that the endorser shall not be liable unless the maker is sued to the first court of the county of his residence, being waived for a specified time, is not revived at the expiration of that time. Afterwards it is only necessary to prosecute the maker to insolvency in order to fix the liability of the indorser.
4. A suit against the endorser of a note, not payable in bank, is premature, when the maker has not been prosecuted to insolvency, and when there is no fact which operates as a discharge of the condition.
5. If, however, the maker is insolvent, and dies before the holder is by law required to sue him, the creditor is then discharged, and the endorser is directly liable. *Quere*—Whether his death alone does not produce the same consequence. But the death of the maker, after suit brought, will not cure the defect.
6. A witness cannot be excluded by proving his confessions of an interest in the suit.

WRIT of error to the County Court of Mobile county.

Assumpsit. The declaration contains three counts; the first and third are against the defendant Ryland, as the indorser of a promissory note, described in the first count as made by McRae & Lang, and in the last, as made by McRae. The note is not payable in any bank, and the excuse set out in both counts for the omission to sue the maker to the first court of the county where he resided, is, that the suit was delayed by the consent of the defendant. The second count, is for money lent by the plaintiff to the defendant.

The defendant demurred to the first and last count, and his demurrer was sustained.

At the trial, he also demurred to the plaintiff's evidence. That was as follows: A note signed McRae & Lang, by C. C. McRae, surviving partner, dated Mobile, 7th March, 1838, payable one day after date, to the order of the defendant, for 2,000 dollars, and indorsed by him. A witness proved that the defendant in a conversation with him, said he had procured some money from the

plaintiff, and gave a note for it prior to his departure from the city. The witness did not know the amount of the note. The defendant had left notes with McRae & Lang, (the indorsers of that note) to be collected, and the money to be applied to its payment. The same witness also proved, that he was present at a previous trial of this suit, and that McRae, the maker, who is now dead, then testified that the note, in evidence in this suit was given by the defendant to the plaintiff, in lieu of the other note, which was given up. That the note was drawn in this form, to enable the holder to claim interest; but he was to wait 12 months with the makers. He also testified that he, McRae, had collected the notes left with him by the defendant, prior to the suit, and had used the money. The witness further proved, that McRae was insolvent at the date of the note, and that his insolvency became notorious a short time afterwards.

The court sustained the demurrer to the evidence, and gave judgment for the defendant.

The evidence of a witness for the plaintiff, had previously been offered, and its introduction resisted, on the ground of interest. One of the interrogatories propounded by the defendant to this witness, was, whether she had any interest in the suit or claim, or would be in any manner benefited by a recovery against the defendant. This was answered in the negative. The defendant read the deposition of another witness, who stated that she had asked the witness whose deposition was resisted, if she was not interested in the money contended for in this suit, and her reply was, yes. The defendant's witness then said, she had always understood that the other witness' mother, herself and her brother, were interested; to which the other replied, that her mother, herself and James F. Bates, owned some cattle together; that James F. Bates drove the cattle to town and sold them, and that he had never made any division of the money.

A witness also proved, that the plaintiff told him he had borrowed a part of the money from his sister (the witness whose deposition was resisted) to lend to the defendant, and that he was responsible to her for it.

Upon this evidence, the court rejected the deposition, and the plaintiff excepted.

The sustaining the demurrers to the first and third counts.

The judgment upon the demurrer to evidence—and,

The rejection of the deposition was now assigned as error.

PHILLIPS, for the plaintiff in error—made the following points: 1. Under the statutes, prescribing how an indorser shall be made liable, suit to the first court against the maker, and a return of no property, is put instead of demand and notice by the law merchant. The act contemplates that the parties may agree otherwise, and allows consent as an excuse for the omission to comply with the requisitions. So, other circumstances have been held to excuse suit at the first court, or afterwards. [4 S. & P. 408; 2 Ala. Rep. 736.]

It is true, a return of no property, is mentioned in the statutes; but it is presumed, the fact of insolvency is the material matter upon which the indorser's liability becomes fixed; and it would be difficult to avoid the consequences of an admission of insolvency.

2. The giving of the note in this case, was no discharge of the pre-existing contract. It was the substitution of one promise for another, without any new or distinct consideration—consequently, as soon as the note of McRae was dishonored, or remained unpaid, after the time given with the consent of the defendant, the plaintiff was entitled to sue on the original contract—[6 Shepley, 250; Hughes v. Wheeler, 8 Cowen, 77; Raymond v. Merchant, 3 ib. 147]—unless it was otherwise expressly agreed. [Page v. Bank, 1 McCord, 449; 7 Wheat. 35; 2 Caines, 117; 6 Term, 52; 8 ib. 451; 7 ib. 64; 9 Conn. 23; 3 H. & J. 193; 5 John, 68; 2 John. Ca 438; 7 John. 313; 9 ib. 310; 2 Ld. Raymond, 928; 5 M. & S. 62; 4 Gill & J. 307.]

3. The deposition was improperly rejected upon the confession of interest in the witness; even if any such confession of interest is clearly proved. [5 Mass. 261; 8 ib. 487; 2 J. J. Marsh. 188; 4 ib. 116; 4 McCord, 310; 6 Shepley, 412; 5 Ala. Rep. 35.]

CAMPBELL, *contra*, insisted—1. That two conditions are imposed on the holder of a note, not payable in bank, before an indorser can be charged. 1. A suit against the maker at the first court. 2. A recovery of judgment against him, and a sheriff's return of no property: each of these conditions may be waived or discharged without affecting the other. [4 Ala. Rep. 394; 2 ib. 736.]

2. The note of McRae & Lang was an additional security to the plaintiff; and the precedent debt of the defendant for the loan, was thereby extinguished; therefore, suit could be brought only

upon the contract of indosement. [21 Wend. 450; 1 Hill, 516; 2 Porter, 401.]

GOLDTHWAITE, J.—The case now to be considered, involves the construction of the several statutes defining the liability of indorsers of promissory notes not payable in bank; and this construction will be best come at by a collation of the original statutes.

The act of 1828, was the first which made a distinction between notes payable in and out of bank; and, with respect to the latter class, provided that the assignee might sue the maker and indorser in the same action, if suit was brought to the first court of the county where the maker resided; but, if the assignee failed to join the indorser in the action, he was not permitted to sue the indorser until the maker was prosecuted to insolvency; which was to be proved by a return of *nulla bona*, or other sufficient proof. If the assignee failed to sue the maker to the first court, then the indorser was discharged from liability, unless the suit against the maker was delayed by his consent. [Acts of 1827–8, p. 37.[

The act of the next session, takes from the assignee the right to maintain a joint action against the maker and indorser, and provides, that the return of *no property found*, upon an execution against the maker, shall be sufficient evidence of his insolvency to authorise a recovery against the indorser. [Act of 1828–9, p. 59.]

It will be seen, therefore, that the act of 1827, as controlled by the subsequent amendment of it, imposes two conditions as preliminary to the liability of the indorser; the first is, that a suit against the maker shall be brought to the first court of the county where he resides; the second is, that the maker shall be *prosecuted* to insolvency. If the first of these conditions is not performed, the indorser is discharged, unless the suit against the maker is delayed by his consent. There is nothing whatever in the statute, which warrants the inference that the consent of the indorser to the delay of suit against the maker, shall relieve the holder from a compliance with the other condition. Nor is there, in our judgment, any sufficient reason to engraft such a construction on the statute. The legislature has thought proper to declare that there shall be no remedy against the indorser until the maker has been *prosecuted* to insolvency, and the consent of the for-

mer, that the suit against the latter may be delayed, connot invest the assignee with a new and distinct right, independent of his contract; which would be the effect, if the liability of the indorser, instead of being conditional upon the prosecution of the maker to insolvency, was to become direct and absolute at the expiration of the time given by the holder to the maker. It is true, that under peculiar circumstances, a very liberal construction has been given to these enactments, so as to let in the remedy against the indorser, when, from the occurrence of some fact, subsequent to the indorsement, it is impossible to perform the conditions within the State. [Roberts v. Kilpatrick, 5 S. & P. 96; Woodcock v. Bennet, 2 Porter, 456.] But the construction given under such circumstances, has no application to the present case, when there is no pretence that the condition might not have been performed.

Our conclusion on this point of the case, then is, that the consent of the indorser, that the suit against the maker might be delayed, did not discharge the other condition upon which his liability depends; and that, notwithstanding the consent, it is incumbent on the assignee to *prosecute* the maker to insolvency, unless that condition in the contract is otherwise discharged. The consequence of this conclusion is, that the judgment on the demurrer to the counts, is free from error.

2. The next question is that which arises on the demurrer to the evidence The plaintiff insists the proof shows that the note executed by McRae was no discharge of the pre-existing liability of the defendant. What this pre-existing liability was, is very clearly shown by the statement of the testimony given by McRae at the previous trial. When the note, now sued on, was made, another was given up, to which the defendant was the maker and McRae & Lang indorsers. That note was, doubtless, for money lent by the plaintiff to the defendant, but there is no evidence showing, or tending to show, that the one sued on was founded on the same consideration. McRae had collected money for the defendant, and used it, instead of paying the note which had previously been given to the plaintiff; and the money thus used by McRae, was the consideration for which the note sued on was given. The actual consideration of the note, as between McRae and the defendant, is not, however, a material inquiry, as it is clear that the note was passed to the plaintiff in lieu of the other note, and could have been given in evidence under the count for money

lent, if the effect of the new contract was otherwise than to discharge or suspend the former one. We shall, therefore, examine the evidence in this point of view.

Notwithstanding the use, by McRae, of money which he was to apply to the payment of the note made by the defendant in the first instance, yet the latter continued liable to the plaintiff, and might have been sued immediately; instead of this course being taken by the plaintiff, the parties met, the new note is transferred and the old one given up or cancelled. The new note was drawn at one day after date to enable the plaintiff to draw interest, but the agreement was to give the maker twelve months to pay it. Under these facts, nothing is more clear than that the creditor, on account of the previous indebtedness of the defendant, accepted from him the note of McRae, without any stipulation or understanding with respect to the manner in which it should operate on the existing claim. It, therefore, becomes necessary to inquire, what consequences flow from these acts of the parties.

In England, the effect of taking a note, under such circumstances, is that the creditor cannot proceed for the original debt without showing the use of due diligence to obtain payment of the substituted note, and notice to the party of its dishonor — [Chitty on Bills, 8 ed. 198, and cases there cited.] Mr. Justice Story lays down the same doctrine, in very broad terms, as the recognized law in this country. [Story on Bills, 127, §112.]— The supreme court of New York seems to go farther, and held, that the original debt is gone by the acceptance, on account of it, of the note of a third person indorsed by the debtor, so that no remedy whatever can be had except on the indorsement. [Frisbee v. Larned, 21 Wend. 452.] If we are correct in supposing this to be the effect of the decision just cited, it cannot, as it seems to us, be reconciled with the English decisions; for there, it is certain, that a suit is maintainable upon the original consideration; and, in a modern case, such was held to be the rule, although the bills, received on account of the consideration sued for, had been passed off to others, upon showing that they had been taken up by the plaintiffs after being dishonored, and were then in the hands of their agent abroad. [Hadwin v. Mendizabell, 10 Moore, 477.] So, too, in Kearslake v. Morgan, [5 Term, 513,] which is the leading case, it is conceded that a plea, to an

action for the original consideration, asserting the note of a third person had been accepted on account of the debt, would be well answered by a replication that the note had been dishonored and notice duly given. These authorities show, very conclusively, that it is immaterial whether the action is founded on the precedent debt, or on the note or bill received on account of it, as, in either case, the plaintiff is bound to show due diligence; and, when the suit is for the original consideration, to also show that the note indorsed to him yet remains his property.

The examination thus made, leads us to the opinion that the plaintiff here is entitled to declare for the precedent debt or consideration, but he is not entitled to a recovery upon it without showing the same degree of diligence as is necessary to charge the defendant on his indorsement. Independent of authority, we think this conclusion can be supported by sound reasons. If the note was indorsed to and owned by a third person, he would have no other rights than such as accrued to him as indorser of the paper. As these rights depend almost entirely, as against the indorsers, upon the exercise of diligence, once gone by *laches*, they cannot be revived by coming into the possession of a former indorser. If *laches* will discharge an indorser who receives money as the consideration of his indorsement, the same reason applies with equal force when the consideration is a precedent debt, as it is impossible to say that he may not be as much injured by the omission of due diligence in the one case as in the other.

3. It is true, the diligence required of the holder of a note is widely different, under our statutes, from that called for by the commercial law; but the difference does not, in our judgment, affect the principle on which the liability depends. Under both systems, the contract of the indorser is conditional, and not absolute. Under the one, demand of payment of the maker and notice to the indorser, is the condition; and under the other, a suit prosecuted to insolvency against the maker; and, also, that such shall be commenced at the first term of the court where the maker resides, unless delayed with the consent of the indorser. In the present case, the evidence was sufficient to authorize the inference, that the suit against the maker was delayed, with the defendant's consent, for 12 months; and the condition required by the statute, in this respect, being waived, was not revived at the expiration of that period: it was necessary only to prosecute to

insolvency at some time after the expiration of that given as delay.

4. The evidence demurred to, does not show the existence of any suit against McRae, or McRae & Lang as the makers of this note; consequently, there is nothing from which to infer that the second condition imposed by the statute, has been performed; nor is there any peculiar circumstance exhibited which leads to the conclusion, that this condition might not have been performed at the time when this suit was instituted. We infer, therefore, that the suit was prematurely commenced, whether the remedy is considered as on the note or as on the original debt.

5. The evidence, however, discloses the fact that McRae is now dead, and was insolvent soon after making the note. If he alone is bound by this note as maker, we think there is no question that the concurrence of his death and insolvency would be a discharge of the statutory condition. Indeed, it may be deserving of serious consideration, whether the mere intervention of the death of a maker of a note, does not produce the same consequences to the indorser, inasmuch as it becomes impossible thereafter, to comply with the condition imposed by statute. The death of the maker of the note having occurred subsequently to the commencement of this suit, does not cure the defect in the title to sue. The rights of the parties must be examined as they were when the suit was instituted; and, as we have shown, being then premature, it cannot be sustained by the occurrence of a fact, the existence of which, at its commencement, would have authorized the suit.

6. Upon the question raised in regard to the rejection of the witness, there is no conflict of decision. A witness cannot be excluded by merely showing his confessions to others that he is interested. [See cases collected in Cowan & Hill's notes, 258.] In no aspect is proof of such confessions any thing more than hearsay; and if permitted to exclude a witness, no rule would tend more effectually to prostrate justice. We place our decision on this ground, because it is perfectly clear; remarking, at the same time, that the evidence of the confession itself does not seem to establish any interest. Although the admission of the testimony of the witness possibly would not have produced a different result in the court below, yet the evidence was proper to

be left to the jury under the common count; and, therefore, for this error, the judgment is reversed.

Reversed, and remanded.

THE STATE v. SLACK.

1. The court has the power, after a conviction for a felony, to grant a new trial, with the consent of the prisoner, and the verdict and judgment will be no bar to his being again tried for the same offence.

This case was brought from the Circuit Court of Fayette on points reserved by the presiding judge as novel and difficult.

The prisoner was indicted for the murder of a slave. The jury found him guilty of murder in the second degree, and the court sentenced him to imprisonment in the penitentiary for ten years.

A motion was made for a new trial, because the verdict of the jury was contrary to law and evidence; which motion was allowed by the court, and a new trial granted, if this court should be of the opinion that a new trial can be granted in such a case as this.

Attorney General, for the State. The provision of the constitution of the United States, that "No person shall be twice put in jeopardy of life or limb for the same offence," is an ancient maxim of the common law; and to that source we must look to ascertain its meaning. It is by the force of this acknowledged maxim of the common law, that a prisoner cannot, after an acquittal, be again tried for the same offence; and the same rule applies where he is convicted. No case can be found in the English books in which a new trial has been granted, where the trial has been regular, and the jury has passed upon the prisoner's guilt. He cited 2 Sumner, 19.

Martin & Huntington, *contra*, were stopped by the court.

They referred to 7 Porter, 217; 3 Dall. 315; 2 Mass. 303; 1 Blackford, 395; 6 S. & R. 577; State v. Fisher, McCord's Rep. 264; 18 Johns. 212; 1 Johns. C. 104.

ORMOND, J.—The humane maxim of the common law, that no one shall be twice put in jeopardy of life or limb for the same offence, has been engrafted on the constitution of the United States, and adopted into our bill of rights.

In the case of the State v. Ned, [7 Porter, 217,] we had occasion to consider the effect of this maxim upon the rights of a prisoner who had been put on his trial in a capital case, and the jury discharged from rendering a verdict because they had declared they could not agree; and it was then held, that he was entitled to his discharge—that having been once in peril of his life, he could not again be put upon his trial for the same offence, unless the jury had been discharged from rendering a verdict from the clear and pressing necessity of the case, which necessity did not exist in that case.

In this case, a regular trial has been had, and the jury have found the prisoner guilty; and the only question is, whether, with his consent, a new trial may not be granted.

The common law maxim and the provision in our bill of rights were, beyond all controversy, designed to protect the lives and liberties of the people—it is the privilege of those who have been tried for the commission of crime, not to be again tried for the same offence; and it would seem to be a perversion of the principle to give it such a construction as to prevent the accused from waiving it when it is clearly his interest to do so. It is true that the common law did not permit one on trial for a felony to consent to any thing which could operate to his prejudice: his consent, therefore, to an irregularity upon his trial, would not conclude him from afterwards taking advantage of it.

This principle is fully illustrated in the case of Alexander and Charles Kinlock, tried for high treason in 1746. In that case, after the prisoners had pleaded not guilty, and a jury were impannelled, on the motion of the prisoners, they were permitted to withdraw their plea, and the jury were discharged, to permit them to plead to the jurisdiction of the court. The plea to the jurisdiction being overruled, and the prisoners again put upon their trial and found guilty, moved in arrest of judgment, the dis-

charge of the jury first impannelled. The motion was based upon the maxim, that having been once in peril of life, they could not again be put upon their trial, and that they were incapable of consenting to any irregularity upon the trial. The question is argued at great length upon the motion by Mr. Justice Foster, and he shows that the prisoners could not avail themselves of the permission, given at their request, to withdraw a juror, because it was a privilege accorded to them by the court. "Not to bring their lives twice in jeopardy, (which is one great inconvenience of discharging juries in capital cases,) but merely to give them one chance for their lives, which it was apprehended they had lost by pleading to issue." [Foster's Crown Law, 37.]

In England, when doubts arise as to the propriety of a conviction in a case of felony, the practice has been, for many years, not to grant a new trial, but to recommend the prisoner to mercy, and a pardon is the invariable result. And in the King v. Mawbey, [6 Term, 638,] we find Lord Kenyon laying down the rule to be that "in offences greater than misdemeanors, no new trial can be granted at all." It is said there is no instance of a new trial having been granted after a regular conviction for a felony in that country, in the last three hundred years. [Chitty's Crim. Law. 3 Am. ed. 654; 2 Russell on Crimes, 530; 13 East. 416.]

In this State, and in many other States of the Union, the rule has been different, and the practice has been to grant new trials in capital cases, at the instance of the prisoner, where a well founded doubt exists as to the propriety of the conviction. [The United States v. Fries, 3 Dall. 315; Commonwealth v. Green, 17 Mass. 515; People v. McKay, 18 Johns. 212; 1 Blackford, 395.]

In the case of the United States v. Gilbert, [2 Sumner, 19,] Mr Justice Story, after an elaborate examination of this question, has attained the conclusion that a new trial can be granted in a capital case where the jury, for sufficient cause, has been discharged from giving a verdict. He denies that any instance can be found in which the English courts have granted a new trial in such a case, where the indictment was sufficient, and there has not been a mistrial, and agrees that no such right exists in this country.

It is certain, as already stated, that the English courts in modern times do not grant new trials in cases of felony, but accomplish the same object by a recommendation to the crown for a

pardon, which is always granted. It does not, however, follow that it is against the principles of the ancient common law that the court should have power to grant a new trial when a doubt exists as to the correctness of the verdict. It would seem to be much more consistent with the spirit of humanity which pervades it, that a new trial should be granted by the court, than that the prisoner should depend on the mercy of the executive.

It cannot be questioned, that the clause in our bill of rights, upon which we have commented, was intended for the protection of the citizen, and it would be a mockery to put such a construction upon it as will make it operate to his prejudice. We are, for these reasons, of the opinion, that the court may, with the consent of the prisoner, grant a new trial after a conviction for a felony; and that the verdict and judgment will be no bar to his being again tried for the same offence.

Let the judgment be reversed, and the cause remanded for another trial.

KIRK, ET AL. v. SUTTLE.

1. Where the plaintiff demurs to the defendant's plea, and submits his case to the jury, who return a verdict against him, he cannot object, in an appellate court that this was no judgment on his demurrer, or that it should have been sustained.
2. A commission to take a deposition was addressed to Thomas N. *Barnham* and William Carr, or either of them, it was executed by a person who signed his name Thomas N. *Barham: Held*, that the name being dissimilar, it could not be intended that the person certifying the deposition was one of those to whom the commission was addressed.
3. In an action against the sheriff, for levying an execution on property which belonged to a third person, C. was offered as a witness for the defendant, who stated that he was a stockholder in a banking company; that N. it was proved, was the *reputed* agent of the company, and had given an indemnifying bond to save the sheriff harmless for levying on and selling the property in question: *Held*, that the proof of N's agency was sufficient as applied to the present case, and that C. was a competent witness for the defendant.

4. Where the defendant pleaded several pleas, all of which were good, and the jury returned a general verdict in his favor, the plaintiff cannot object on error, that the court refused to charge the jury, that if they found for the defendant they should state to which of the pleas their finding applied.

WRIT of error to the Circuit Court of Bibb.

This was an action of trespass at the suit of the plaintiff in error, against the defendant, for taking and carrying away a female slave named Amy, four mules, two horses, one wagon and one barouch, alleged to be the property of the plaintiffs. The cause was tried on the plea of not guilty, to the entire declaration, and two special pleas of justification, as to all the property in question, save the mules, under writs of *fieri facias*, against the goods and chattels, &c. of William Kirk, which were placed in the hands of the defendant, as the sheriff of Bibb county, to execute. A verdict was returned for the defendant, and judgment thereon rendered.

On the trial, the plaintiffs excepted to the ruling of the presiding judge. It appears from the bill of exceptions, that the plaintiffs offered as evidence, several depositions taken in the State of Mississippi; the defendant objected to their admission, on the ground that they were taken by Thomas N. Barham, under a commission addressed to Thomas N. Barnham and William Carr, or either of them; the objection was sustained by the court, and the depositions excluded.

The defendant offered as a witness, James Cave, but the plaintiffs objected to his examination, on the ground that he was interested in the result of the suit; the witness being examined on his *voir dire*, stated that he did not know that he was interested, but said he was a stockholder in the Real Estate Banking Company of South Alabama. It was then shown, that Robert R. Nance had given an indemnifying bond to the defendant as sheriff, to save him harmless for levying on the property, for the seizure and sale of which, this action was brought; that a part of the proceeds of what had been sold, had been applied to a judgment in Nance's favor, and that Nance was the reputed agent of the Real Estate Banking Company. The court adjudged that Cave was a competent witness, but the facts recited mitght go to the jury to impeach his credibility.

The plaintiff's counsel then prayed the court to charge the ju-

ry, that if they should find for the defendants, they should render a special verdict, stating under which of the defendant's pleas they found their verdict, which charge was refused by the court.

The plaintiffs here assign for error the questions arising upon the bill of exceptions; and further, that there was a demurrer to the third plea, which does not appear to have been disposed of by the circuit court.

E. W. Peck, for the plaintiffs in error.
C. G. Edwards, for the defendant.

COLLIER, C. J.—1. In respect to the demurrer to the third plea, that "will be considered as waived, and the parties understood to have gone to trial, without requiring an issue to be made up." [1 Ala. Rep. 155, N. S.]

2. The commission to take a deposition, is the warrant by which the persons to whom it is addressed are authorised to examine the witness, and to make the testimony admissible, it should be taken and certified by the commissioners specially designated, and at the time appointed for the purpose. [Worsham v. Goar, 4 Porter's Rep. 441.] In Campbell & Webb v. Woodcock, 2 Ala. Rep. 41, it was held that a commission addressed to S. or any justice of the peace of L. county, &c. did not authorise any one but S. to take the deposition. [Collins v. Fowler, [4 Ala. Rep. 647. See also, 3 Wash. C. C. Rep. 404; 4 id. 215–9.]

In the present case, the commission is an authority to Barnham and Carr, or either of them, but it is executed by Barham alone. This latter name is very different from that of either of the commissioners, and it cannot be assumed that he is the same person as Barnham, merely from the fact, that he has the same christian name. Whether it would be competent to prove their identity by extrinsic proof, is a question not presented for our decision; in the posture in which the question comes up, we are satisfied that the depositions were rightly excluded.

3. The evidence of Cave's interest, was not such as authorised his rejection as a witness. Although he was a stockholder in the Real Estate Banking Company, there is no sufficient proof that Nance was the agent of that association. It was not shown that he acted in that character, but merely that he was *reputed* to be its agent. This is a fact which, if it existed, should have

been proved by evidence more satisfactory than reputation, in the usual acceptation of that term. But if the fact of agency had been established, the proof that the Banking Company was interested in the result of this suit, is altogether insufficient; for it by no means follows that the principal is necessarily interested in every judgment recovered by the agent in his own name. This would be to maintain, that by taking upon one's-self the character of agent, he is incapable of dealing upon his own account, and relinquishes to the principal all judgments and other claims which may be in his favor, or stand in his name.

4. It is unnecessary to consider whether the charge prayed by the plaintiff's counsel, should have been given or not. Its refusal did not injuriously affect them; for if the jury did not believe the pleas of justification to be true, they must have been satisfied that the plaintiffs failed to make out their entire case. And whether the justifications were sustained by the defendant or not, the plaintiffs certainly failed to prove the trespass as to the mules.—This is all shown from the state of the pleadings—the general issue negativing the cause of action *in toto.*

The pleas are all well pleaded, and if demurred to, would be adjudged good. There is then no reason perceivable why the plaintiffs should be allowed to object, that the charge asked for, was not given. The judgment of the circuit court must be affirmed.

CARPENTER, ET AL. v. LEWIS, ET AL.

1. Boards, rails and bricks, cut and made from the soil of land belonging to the United States, and appropriated by the maker, do not pass to one who subsequently purchases the land from the United States, although the severed chattels are remaining on it; and the maker may maintain trover for their conversion by the person who thus becomes the owner of the land, he showing no connexion between himself and the United States with respect to the severed chattels.

WRIT of error to the Circuit Court of Randolph county.

Trover, by Lewis and the other plaintiffs, to recover damages from the defendants for the conversion of certain bricks, boards and rails.

The defendants pleaded the general issue; and, also, that the property in the bricks, &c., was in one of them. To the latter plea, the plaintiff demurred, and the court sustained the demurrer.

At the trial, the proof conduced to show, that the bricks, boards and rails were made by the plaintiffs on and out of the soil and timbers of a certain 40 acre tract of land, which, at the time when the bricks, &c., were made, belonged to the United States; being then unoccupied and subject to entry. The bricks were in a kiln, burned, and fenced in by the rails and covered by the boards on the said tract of land, from August, 1842, until the middle of October of the same year.

One of the defendants entered and paid for the tract of land on the 12th September, 1842, and showed the proper certificate in evidence. After this time, the defendants took the bricks, sold them, and used the rails and boards.

On this evidence, the court charged the jury, that the bricks, rails and boards were of that kind of property for the conversion of which an action of trover would lie; that if the bricks, &c., were made by the plaintiffs out of the soil and timber of the said tract of land, prior to the 12th of September, 1842, the defendants were liable for the conversion, although one of them then entered the land, and the bricks, &c., were remaining on it at the time of the conversion; and that there was no difference, so far as this case was concerned, whether the plaintiffs were regarded as trespassers on the public lands or tenants at will of the United States. These charges were excepted to, and are now assigned as error; as is also the overruling of the plea demurred to.

Rice, for the plaintiffs in error, cited 4 Ala. Rep. 402; 7 Cowen, 95; 6 Johns. 169; 1 Ala. Rep. N. S. 219.

W. P. Chilton and Huntingdon, *contra.*

GOLDTHWAITE, J.—The defendants do not pretend that either of them had any title to the land out of the soil of which the

bricks were made, and from which the timber for the rails and boards was cut, at the time when these matters were severed from the freehold by the plaintiffs. Neither is it a question whether the rails were appendant to the land, at the time of the entry of it by one of the defendants, in consequence of constituting a fence or inclosure for the protection of the soil or of the buildings upon it. The matter to be determined is, whether the defendants can resist a recovery, either on the ground that one of them is entitled to these chattels by virtue of his entry of the land; or by reason of a title in the United States superior to that of the plaintiffs.

The general rule is, that when chattels, which in their natural state are a part of the freehold, are severed therefrom, they become personal chattels, and belong to the owner of the land.—Thus it has been held, that the owner might maintain trover for boards sawed from timber cut from his lands by a trespasser. [Brown v. Sax, 7 Cowen, 95.] And the same rule has been held to apply to charcoal made upon the land of another by a trespasser. [Curtis v. Grant, 6 Johns. 168.] It may, perhaps, admit of some question, whether the damages consequent upon a recovery, in cases such as are cited, should include the increased value which is given to the chattel by the labor of him who converts it. However this may be, these decisions are satisfactory to show that, by the severance from the freehold, the chattels become the personal goods of the owner of the land. The soil, from which these chattels were severed, was, at the time of the severance, owned by the general government, and, therefore, it follows they belonged to the United States, unless the plaintiffs were permitted by usage or law to enter upon the public domain and appropriate the soil and timber. We do not propose to consider whether the plaintiffs are thus permitted; because, as between them and the defendants, this is an immaterial question. Previous to the acquisition of the title, by one of the defendants, the chattels had not only been severed from the land, but had also been appropriated and converted by the plaintiffs; therefore, it may be questionable whether any title could be conveyed by actual sale; but conceding that the absolute title might be conveyed by the United States, we think it very clear, that the defendant Carpenter, by his entry of the land, acquired no title to the severed and appropriated chattels. In this respect, the case

is not different from what it would have been if the title had been acquired from an individual.

The defendants can claim no protection from the supposed right of property in the United States, because they are in no manner connected with it. As between the parties to this suit, the plaintiffs have the right of possession, and this is sufficien to enable them to maintain trover against a stranger. [Duncan v. Spear, 11 Wend. 55; Pinkham v. Gear, 3 N. H. 484.]

As to the plea, it may be that it was improper to sustain the demurrer; but that is now immaterial, as the same defence was in evidence under the general issue; and, therefore, no injury has resulted to the defendants, as was decided in McKinzie v. Jackson, [4 Ala. Rep. 230.]

Our conclusion is, that the record discloses no available error.

Judgment affirmed.

THE STATE v. NEILL.

1. In a prosecution by the State against a husband for an assault and battery on his wife, the wife is a competent witness for the husband to disprove the charge.

NOVEL and difficult questions, from Dallas Circuit Court.

The defendant was indicted for an assault and battery upon his wife. Upon the trial, he offered to introduce her as a witness, to disprove the charge, but the court, on motion of the solicitor, considering her incompetent, excluded her, and reserved the consideration of the question for this court.

ATTORNEY GENERAL, for the State,—cited 2 Starkie's Ev. 707; Arch. P. 148; Bull. N. P. 286; 1 Hale, 301; 1 Stew. 635; Greenleaf's Ev. 391; 2 Hawk. 600.

G. W. GAYLE, *contra*—cited 2 Russell on Crimes, 550, top page.

ORMOND, J.—Husband and wife cannot, in general, be witnesses for or against each other. The exclusion rests, not only on great principles of public policy resulting from the marriage relation, but also because their interests are identical. To this rule, there are certain exceptions, one of which is, that the wife may be a witness for the prosecution against the husband, to prove violence or injury to her person. This was so held in Lord Audley's case, and has been considered as law ever since. Can she in such a case be a witness for him to disprove the charge. It is stated by Philips in his treatise on evidence, that she is a competent witness, [1 vol. 85,] and the authorities appear to sustain him in the position, [Rose v. Sergaint, 1 Ry. & Moody, 354,] where the opinion of Chief Justice Gibbs is cited with approbation, that in all cases where a wife can be examined against her husband, she is competent to testify for him; and upon an indictment for a forcible marriage, he permitted the wife to testify for the husband, and to prove that the elopement and marriage were voluntary.

Considered upon principle, we are unable to perceive any good reason why the wife in such a case should be excluded. The offer of the wife as a witness, presupposes the case to be made out *prima facie* by other proofs. But certainly the wife must know the fact better than any other person, and if willing to be examined, ought to be permitted to testify. It is supposed that the caresses or coercion of the husband, might induce her to conceal the fact. If the former, it would seem to prove that the breach, if any existed, had been healed, and the State could certainly have no interest in exposing to the public gaze, a matrimonial dispute, which those, most, if not solely, interested in, were willing to bury in oblivion. If the latter, it can work no injury, armed as the wife is, with power to redress herself, if such coercion is unreasonable, or amounts to the threat or infliction of punishment. Besides, there may be extenuating circumstances, known only to herself, which, if given in evidence, would mitigate or change the character of the offence. In every aspect in which we can consider the case, we think the testimony admissible, and for its exclusion, the judgment must be reversed, and the cause remanded.

BLICK v. BRIGGS.

1. A count in case is good, which alleges that the plaintiff delivered to the defendant certain negroes to be hired out by him as auctioneer (upon a reasonable reward,) for twelve months, but to be delivered to the hirer upon his giving good security; and that the defendant did dispose of them to G. W. for that time, for $292, without security; in consequence of which the hire remains unpaid, and is wholly lost, &c.
2. The declaration alleges that it was agreed between plaintiff and defendant that the latter would be G. W's surety for the sum of $292, for the hire of certain slaves, if the plaintiff would credit G. W. therefor; that the plaintiff, at defendant's special instance, &c. did give the credit, yet the defendant refused to become his surety; by reason whereof the said sum remains unpaid, and is and will be wholly lost to the plaintiff: *Held*, that the declaration discloses a cause of action, for which case will lie, and that it was not bad, because it did not aver the agreement was in writing.

WRIT of error to the County Court of Sumter.

This was an action on the case at the suit of the plaintiff in error against the defendant. The declaration contains two counts. In the first, it is stated that the plaintiff caused to be delivered to the defendant two negroes (who are named, &c.,) to be hired out by him as an auctioneer for the space of twelve months; but the possession only to be given up by the defendant upon good security being given by the hirer; for which service, the defendant was to receive a reasonable reward. It is then alleged, that the two slaves were disposed of to one George Wilborne, for the term of twelve months, for two hundred and ninety-two dollars, and were delivered to him without security; whereby the hire remains unpaid, and is wholly lost, &c.

The second count alleges, that it was agreed between the plaintiff and defendant that the latter should stand security for the sum of two hundred and ninety-two dollars, to be paid by George Wilborne for the hire of certain slaves, in consideration that the plaintiff would credit the latter for the hire. That the plaintiff, at the special instance and request of the defendant, did give the credit to Wilborne, yet the defendant refused to become his surety; by reason whereof, the sum of two hundred and ninety-

two dollars remains unpaid, and is, and will be wholly lost to the plaintiff.

R. H. Smith, for the plaintiff in error. The demurrer is to the whole declaration, and if either count is good it is sufficient. It is believed that both counts are properly framed, and disclose a cause of action for which case is the appropriate remedy. [1 Chit. Plead. 366, 370–1, 136, 7, 140, 146; Chitty on Bills, 228, 263; Chitty on Con. 203; 3 Cranch's Rep. 492.]

No counsel appeared for the defendant.

COLLIER, C. J.—We are at a loss to perceive upon what ground the county court sustained the demurrer to the declaration. The first count is clearly good; and the second, if maintainable, discloses a cause for which the plaintiff may as well have sued in case as assumpsit. There was then no misjoinder, and the demurrer being general, should have been overruled *in toto*.

Upon the hypothesis that it may have been supposed that the action was misconceived, we will briefly consider for what causes case is the proper remedy, at least so far as it is material to the present inquiry. It is said that this action is not confined to injuries merely *ex delicto*—it is a concurrent remedy with assumpsit for many breaches of contract, not merely for the payment of money, whether the breach were *nonfeasance*, *misfeasance* or *malfeasance*. Thus, case lies upon an express agreement in obstructing the plaintiff in the enjoyment of an easement, of which the defendant stipulated that he should have the benefit; and it seems to be maintainable for not accounting for the produce of bills delivered to the defendant to get discounted.

It has also been held, that if a party has transferred a bill without indorsing it, when it was intended he should do so, a bill may be filed in equity to compel him; and a special action on the case may be maintained against him for a refusal. [Chitty on Bills, 228, 263, 9 Am. ed.]

In Burnett v. Lynch, [5 B. & C. Rep. 589,] it was said that case affords a most extensive remedy for all breaches of duty, *quasi ex contractu*; and where, from a given state of facts, the law raises an obligation to do a particular act, and there is a

breach of that obligation, and a consequential damage, an action on the case, founded in tort, is the proper remedy. Such an action has been sustained by the lessee against his assignee for neglecting to perform his covenants, in consequence of which the lessor had recovered damages of the lessee. In the case last cited, it was said by Abbott, C. J., that case often lies as a concurrent remedy with assumpsit, and that it by no means follows, that because a promise may be implied by law, the action on the case, which is in terms founded on the breach of *that duty from which* the law *implies* a promise, may not also be maintainable.

It is said there is no inconvenience in suffering the plaintiff to allege his *gravamen* as consisting in a breach of duty arising out of an employment for hire, and to consider that breach as tortious negligence, instead of regarding the same circumstances as forming a breach of promise implied from the consideration of hire. [Govett v. Radnidge, 3 East's Rep. 70.] Not only where there is implied, but express contracts, if they *create a duty*, will case lie; for "although there be an express contract, a party is not bound to resort to that contract, but he may declare on the tort, and say that the party has neglected to perform his duty."—By Bayley, J., Burnett v. Lynch, *ut supra*. [Mast v. Goodson, 3 Wils. Rep. 348; Bretherton v. Wood, 3 B. & B. Rep. 54.]

By allowing a party to declare for a neglect of duty, although there is a breach of promise, a multiplicity of actions is sometimes avoided; "and the plaintiff, according as the convenience of his case requires, frames his principal count in such a manner, as either to join a count in trover therewith, if he have another cause of action, other than the action of assumpsit, or to join with the assumpsit the common counts, if he have another cause of action to which they are applicable." [Govett v. Radnidge, *ut supra*; Weall v. King and another, 12 East's Rep. 454.] Other advantages may result from the adoption of case instead of assumpsit. In the former, the defendant *cannot always* plead in abatement the non-joinder of other parties as defendants; and the plaintiff may frequently recover if he prove one of several defendants to be liable; which is not allowable in assumpsit. [Max v. Roberts, et al. 12 East's Rep. 94; 1 Chit. Plead. 134–5, 8.]

From this view of the law, it will be apparent that both the counts disclose a cause of action for which a declaration may be framed in case. In respect to the first count, the duty incum-

bent upon the defendant, as well as its breach, are clearly stated. We were inclined to question the sufficiency of the second count, but further examination has satisfied us, that it is at least substantially good when considered with reference to the act of 1824, which dispenses with special demurrers and discourages objections that are merely formal.

It cannot be assumed that the agreement disclosed in the second count, is obnoxious to the statute of frauds. For any thing shown to the contrary, it may have been in writing, and if so, no such objection can be urged. In declaring on a contract to pay the debt of a third person, it is not necessary to allege that the promise was written; but it would be necsssary to prove it, unless its validity was admitted by the pleadings.

Again; we could imagine a state of facts which it would be permissible to show, under the second count, that would establish a right of recovery, although there was no written evidence of the defendant's undertaking. But it is unnecessary, and, perhaps, improper in the condition in which this case comes before us, to be more particular, upon this point. It is sufficiently apparent from what has been said, that the demurrer was improperly sustained; the judgment is, therefore, reversed, and the cause remanded.

DESHA, SHEPPARD & CO. v. POPE & SON.

1. A mere agreement to ship goods in satisfaction of antecedent advances, will not, in general, give the factor or consignee a lien upon them for his general balance until they come to his actual possession; but if there is a specific pledge or appropriation of certain ascertained goods, with the intention that they shall be a security, or the proceeds as a payment, and they are deposited with a bailee; then the property is changed and vests in the individual to whom they are to be delivered.

WRIT of error to the Circuit Court of Mobile county.

Claim of property, by Desha, Sheppard & Co., to 18 bales of

cotton, levied on by the sheriff of Mobile county, by virtue of an execution in favor of Pope & Son, against W. J. Alexander.

At the trial it appeared, that the execution under which the levy was made, came to the sheriff's hands on the 20th day of December, 1841, and was levied the day afterwards. The cotton levied on, had previously been secured in a warehouse in Montgomery, where it was stored in the name of Alexander; by his order it was shipped, by the warehouse keeper at Montgomery, on the 18th December, 1841, on board the steamboat W. W. Fry, consigned to Desha, Sheppard & Co. for account of Alexander. The claimants then proved, they were the commission merchants or factors at Mobile, of Alexander, who was a planter in the interior of the State, that as such, they had previously made advances to him, under the promise that cotton should be shipped to them for the payment of such advances; and that at the time of the shipment, he owed them a much larger amount for such advances, than the value of the cotton. They also proved that the cotton in question had been shipped at Montgomery, by the warehouse keeper, under the directions of Alexander to them as factors, and expressly to pay them for such advances as far as it would go; that the bill of lading, in the form of a letter, was forwarded by the same boat, directed to them at Mobile.—They further proved that the steamboat, with the cotton, arrived at Mobile the 20th or 21st of December, and that at the moment she landed at the wharf, a clerk of their's went on board and received from the clerk of the steamboat, the bill of lading: that immediately afterwards, the cotton was delivered by the steamboat on the wharf to a public weigher, who received it for them, and by their authority. The claimants paid the freight to the master of the steamboat, and the cotton was so delivered and freight paid, before the sheriff levied on it. The plaintiffs were the owners and consignees of the boat.

Upon this proof, the court instructed the jury, that if they believed the execution came to the hands of the sheriff before the cotton or the bill of lading for it, came into the actual possession of the claimants, that the lien of the execution bound the cotton, and they should find for the plaintiffs.

The claimants requested the court to charge the jury, that if they believed the cotton was shipped by Alexander at Montgomery, on the 18th December, 1841, and consigned to them as factors,

for the payment of advances by them made, and that the bill of lading for the cotton was also delivered on the boat at that time by Alexander, or by his directions, to be delivered to them and addressed to them, that such delivery of the cotton and bill of lading to the carriers was a constructive delivery to the claimants as of the date of the shipment; and the lien of the execution would not overreach the lien of the claimants. This was refused, and the jury was instructed, that the lien of the claimants as against the execution creditor, would only commence at the time of delivery to them in Moble. The clamants excepted to the charges given, as well as the refusal to charge as requested.

A verdict was returned for the plaintiffs, assessing the value of the cotton at 650 dollars. Upon which a judgment was rendered, that the plaintiffs should recover that sum of the claimants, and certain other persons as their sureties on the bond given by them for the trial of the right of property.

At the ensuing term, this judgment was vacated, and the proper one entered upon motion of the plaintiffs.

The charge given, and that refused, is now assigned as error, as is also the vacating of the irregular judgment, and the entering of the proper one at a subsequent term.

Stewart, for the plaintiffs in error, insisted that the rights of the claimants over the cotton attached as soon as it was shipped, and the bill of lading directed to them, delivered on the boat.—[2 Hill, 147, 137; Cross on Liens, 252–3; 1 B. & P. 563; 1 East, 506; 2 Bingh. 20; 12 Pick. 314; 15 Mas. 528; 24 Wend, 169.]

The entry of the judgment was the consideration of the court, and therefore, not the subject of amendment. It cannot be considered as a clerical error.

Campbell, *contra*—insisted that the current of authority establishes that a shipment of goods to be carried to a distance to a consignee, vests the property in him.

1. When the shipment is made, in pursuance of a previous order, applicable to the specific shipment, at the risk of the consignee, and when the bills of lading are taken to him.

2. When the shipment has been made for a specific object, in which the consignee is interested by contract, and the bills of la-

ding, duly executed to the consignee, have been sent forward and received before the adverse lien attaches.

3. But the property does not vest *until possession by the consignee* when shipment is made without any previous order referring to the specific consignment: if the consignment is on account of the shipper, and where the bills of lading have not been received. [21 Pick. 321; 39 E. C. L. R. 261; 3 D. & E. 119; 8 Cranch, 335, 419; 1 Exch. Rep. 422; 2 Wash. C. C. 403; 5 M. & S. 350; 7 Taunt. 169; 2 Hill, 147; 17 Mass. 197; 1 Peters, 445; 4 East, 241; 1 John. 215; 2 East, 235.]

GOLDTHWAITE, J.—If the claimants of the cotton levied on in this case, stood in the relation of factors only, it is clear upon principle, that their lien for the balance due them, could not attach until the cotton was in their actual possession. [Kenlach v. Craig, 3 Term Rep. 119; Bruce v. Wait, 3 Mee. & W. 15; cited Cross on Liens, 254.] The reason for this is, that they have no property in the goods by the mere act of shipment, although they are named in the bills of lading as the consignees. By itself, the bill of lading does not operate as a transfer of the goods; but is rather to be considered as evidence, or as an act raising the presumption, of such a transfer. [Abbot on Ship. 375; Cox. v. Harden, 4 East, 211; Haille v. Smith, 1 B. & P. 363.]

But it appears from the evidence set out in the bill of exceptions, that, independent of the relation between the claimants as factors, and Alexander, the defendant in execution, the cotton was shipped *expressly* to pay them, so far as its proceeds would go, for advances previously made by them; and the bill of lading was transmitted to them. Under these circumstances, the shipment must be considered as a specific appropriation of the cotton for the security of the claimants. This appropriation did not rest in intention merely, for it was executed, so far as the defendant in execution was concerned, by the transmission of the bill of lading to the consignees. The debtor could have made an assignment, or other valid transfer of the title to this cotton, for the security of the claimants at any time, before the lien of the plaintiff's execution attached, and there is no sound reason which should prevent the bill of lading from producing the same effect after its transmission, and when the shipment was expressly made for this purpose. This is the effect of the cases of Haille v. Smith, [1 B. & P. 563,]

and Anderson v. Clark, [2 Bing. 20,] as well as that of Grosvenor v. Phillips, [2 Hill, N. Y. 147.] Nor is this principle contradicted in any of the cases cited by the counsel for the plaintiffs; indeed, in some of them, it is expressly conceded. [Kenlach v. Craig, 3 Term Rep. 119; Mitchell v. Ede, 11 A. & E. 888; Nichols v. Clent, 3 Price, 547.]

Although in theory, the principle stated is perfectly obvious, there may be some difficulty in applying it to the facts of some cases; we shall, therefore, endeavor to state it so that it cannot be misunderstood. The mere agreement to ship goods in satisfaction of antecedent advances, will not, in general, give the factor or consignee a lien upon them, for his general balance, until they come to his actual possession; but if there is a specific pledge or appropriation of certain ascertained goods, accompanied with the intention that they shall be a security, or the prooceeds as a payment, and they are deposited with a bailee, then the property is changed, and vests in the individual to whom they are to be delivered by the depository. [Cross on Liens, 253.]

The result of our opinion is, that the circuit court erred in refusing to give the charge requested by the claimants; the judgment is, therefore, reversed, and the cause remanded.

BROWN v. BARNES.

1. A promise, not in writing, to pay the debt of another, is within the statute of frauds, unless it be made upon some new consideration *beneficial* to the promisee.
2. A promise by one, that he will pay the debt of another, if the creditor will state the account, and make affidavit of its correctness, before the Mayor of the city of Philadelphia, is void under the statute of frauds, unless it be in writing.
3. The declaration in such a case, need not state that the promise was in writing; it will be sufficient to prove it to be so on the trial.

ERROR to the Circuit Court of Sumter.

Assumpsit by the plaintiff against the defendant in error.

The declaration alleges that one William D. Barnes was indebted to the defendant at Philadelphia in an account for goods sold; and that the defendant being advised thereof, and having the custody of the estate of said William and the management of his affairs, in consideration thereof; and in consideration that he would state the items of the account against the said William, and make affidavit before the mayor of the city of Philadelpbia of the correctness of the account, and get the mayor to certify the fact under the seal of his office, promised the plaintiff to pay him the amount of his account. The declaration proceeds to aver the stating of the account, amounting to $127 87; that affidavit of its correctness was made before the mayor and duly certified, &c.; and breach.

To this declaration the defendant demurred, and the court sustained the demurer, and rendered judgment for the defendant; which is now assigned for error.

Reavis, for plaintiff in error. The consideration is sufficient. [Chitty on Contracts, 30.] The consideraton is a new one, and the undertaking original, and not within the statute of frauds. [3 Burr. 1886; 21 Maine Rep. 410; 8 Johns. 39; 10 N. H. 32; 4 Ala. 230.] But if otherwise, the declaration need not state the promise to be in writing. [2 Saund. P. & E. 546; 4 Johns. 237.]

Bliss & Baldwin, *contra*, cited 3 Metcalfe, 396.

ORMOND, J.—Conceding that the consideration in this case would have been sufficient to sustain an action upon the promise to pay the debt between the original parties to it, we will consider whether it would be sufficient, under the statute of frauds, as a promise to pay the debt of another, unless the promise was in writing.

The counsel for the plaintiff in error insists, that this case is not within the statute, because the promise is made upon a new consideration, by which an onerous and, possibly, expensive burthen was cast upon the promissee.

In McKenzie v. Jackson, [4 Ala. 230,] we had occasion to consider this question. There, the consideration for the promise, which was not in writing, was the receipt, by the promissor, of

a stock of goods from G., in consideration of which, he agreed, by deed with G. to pay certain of his creditors; and afterwards, by parol, promised the plaintiff, one of them, to pay his debt, and we held the promise not within the statute of frauds. The decision in that case turns upon the fact, that the promise was made upon a new consideration *beneficial to the promissor*. The same decision was made by the supreme court of Massachusetts, in the case of Nelson v. Boynton, [3 Metcalfe, 396,] after an elaborate examination of the authorities. The case was, that a creditor had commenced a suit by attachment, and levied on the property of the debtor; and a son of the debtor promised the creditor that if he would dismiss the attachment he would pay the debt. The attachment was dismissed; and the debt not being paid, a suit was brought upon the promise by the creditor against the son. The court held it to be within the statute, because the consideration for the promise was not beneficial to the promissor, though it might be injurious to the promissee.

In this case, the promise was of no benefit whatever to the promissor, and was not, therefore, binding as an original promise between the parties to the new contract under the statute of frauds, unless in writing.

A promise by A. that he will pay B. a debt, which the latter claims of him, if he will swear to it or prove it in a particular mode, would doubtless be a good consideration for an action on the promise at common law. [See the cases collected on this head in Com. Dig. Assumpsit B. 4.] But in these cases, it is to be observed, that the debt is a consideration to support the promise. When the promise is to pay the debt of another, the debt may be a sufficient consideration; but the statute requires that it should be in writing, unless the consideration of the promise is beneficial to the person making it. In that event, it is a new and substantive contract not within the contemplation of the statute, the design of which was not to protect men against the payment or discharge of their own contracts, but to protect them against the payment of the debts of others.

The declaration does not state whether the contract was in writing or not; nor was it necessary that it should have been stated to be in writing: it will be sufficient if it is proved to be so on the trial. The court, therefore, erred in sustaining the demurrer to the declaration; and for this cause the judgment must be reversed, and the cause remanded.

BATES v. STARR.

1. A writing in these words, and signed J. D. S., viz: "Mr J. S. will apply to you for the rent and disposal of yonr building, now in charge of D. M.: any arrangement he can make with you as regards renting the same, I will be responsible for," is a direct and positive promise to pay, if the persons addressed would rent the house to J. S., and an action may be maintained thereon against D. J. S., without the necessity of a notice, or demand as required in case of a guaranty.
2. *Quere?*—Where the declaration correctly describes a writing, and is founded on it, if insufficient to support an action, should not the defendant demur; and if the cause is submitted to a jury on the plea of *non assumpsit*, can the writing be excluded, if correctly described, on the ground that it does not tend to establish a legal liability.

WRIT of error to the Circuit Court of Barbour.

This was an action of assumpsit at the suit of the plaintiffs in error against the defendant. The declaration contains too counts; in the first, it is stated that the plaintiffs being the owners of a store-house in the town of Irwinton, the defendant on the fourth of October, 1841, sent one John Searll to rent the same, and promised them that any contract Searll might make for the renting and disposal of the store-house, he, the defendant, would be responsible for. It is then averred, that in consideration of the defendant's promise, the plaintiffs rented the house to Searll at eight dollars per month, from the fourth day of October, 1841, to the second day of December, 1842. By means whereof, the defendant became liable to pay, &c.

The second count alleges, that the defendant was indebted to the plaintiffs in the sum of one hundred and eleven dollars and forty-six cents, for the rent of a store-house in Irwinton, to John Searll, at the special instance and request of him, the defendant on the fourth day of October, 1841; and in consideraton thereof, &c.

The cause was tried upon issues to the pleas of non assumpsit, payment and failure of consideration. To make out his case, the plaintiffs offered in evidence a writing of the following tenor:

Messrs W. & Geo. Bates. Irwinton, Oct. 4, 1841. Gent.

Mr John Searll will apply to you for the rent and disposal of your building, now in charge of David McPhail: any arrangement he can make with you as regards renting the same, I will be responsible for. In haste, Gent. yours truly,

H. D. STARR."

To the admission of this paper, the defendant objected, on the ground that it was merely a letter of credit; and without proof, showing that the plaintiffs had demanded the rent of Searll, and payment had been refused by him, they could not recover. The objection was sustained, the evidence excluded, and thereupon the plaintiffs excepted, and their exception is duly certified.

J. A. CALHOUN, for the plaintiffs in error.
J. COCHRAN, for the defendant.

COLLIER, C. J.—The only question in this case is, whether the undertaking of the defendant is an original and direct promise to pay the plaintiffs so much as Searll might agree should be the price of the rent of their store house, or was it collateral to, and dependent upon the non-performance of a contract made with Searll on his own account. It is insisted for the defendant, that Lawson, et al. v. Townes, Oliver & Co. [2 Ala. Rep. 373,] is a case in point, and fully sustains the decision of the circuit court.—In that case, the defendants gave a recommendation in writing, to a third person, addressed to "whom it may concern," stating his desire to purchase a stock of liquors, &c. and concluding with a warranty of the fulfilment of his contract." "This court considered the writing a letter of credit and guaranty, and to charge the persons subscribing it, notice should have been given of the sale of the goods, and the demand of payment of the primary debtor.

In Chase v. Day, [17 Johns. Rep. 114,] the defendant said to the plaintiff, if he would let his nephew have newspapers to sell, &c. he would be responsible for the papers he should take: Held, that this was an original contract; for the credit was wholly given to the defendant, who made the promise. It is of the essence of a guaranty, that there should be a principal debtor, for it is a collateral engagement for another. [Chitty on Con. 397.] But if a third person be not liable, or the defendant be liable with him jointly, then the promise will be considered as primary, and not accessorial. [Chitty on Con. 408.]

In the case before us, the defendant informs the plaintiffs, that Mr. Searll would apply to them for the rent of their building, then in charge of David McPhail, and promises to be responsible for any arrangement, he may make in respect to renting the same. Here is a direct promise to be responsible for the payment of the rent, not to answer for the default of Searll. In fact, it cannot be assumed from the writing, that the latter wanted the house for his own use, or that it was expected any credit should be given to him by the plaintiffs. From any thing appearing to the contrary, Searll may have been employed by the defendant as an agent to procure the house for him. But be all this as it may, the engagement of the defendant does not depend upon the non-performance of a contract by another, but the terms employed are equivalent to a direct and positive promise to pay, if the plaintiffs would rent the house to Searll. This was done, and the defendant's liability thereby fixed, without the necessity of a notice or demand, as required in the case of a guaranty.

We have not thought it necessary to consider the form of the counts in the declaration, yet it seems to us that the writing could not have been excluded under the first; for that count describes it, and the legal question presented on the bill of exceptions, should have been raised on demurrer. But without adding more, it is clear that the circuit court erred in excluding the evidence from the jury; its judgment is consequently reversed, and the cause remanded.

LOGAN v. HODGES.

1. H. in consideration of the promise of L. to pay a certain note due from H. to another person, executes his notes to L. for the same sum. L. commenced suit against H. before the note was paid: *Held*, that the payment of this note was not a condition precedent to be performed before L. could recover on the notes of H.

WRIT of error to the County Court of Sumter county.

Logan sued Hodges before a justice of the peace in ten suits on promissory notes, which were removed into the county court by *certiorari*. There the suits were separately disposed of; and at the trial of this one, upon the pleas of usury and non-assumpsit, the respective statements of the parties, under oath, were suffered to go to the jury without any exception taken on either side. According to the defendant's statement, the notes were entirely for usurious interest; but, by that of the plaintiff, they were given upon the consideration of his assuming to pay a debt due from the defendant to one Glover by note; which debt constituted a lien on certain lands, which the plaintiff had purchased from the defendant, and which the latter had conveyed upon the receipt of 1000 dollars in money, and the cancellation of certain notes which the plaintiff admitted to be for a usurious loan, and in which the usurious interest was greatly more than the sum of the notes sued for in these actions. The plaintiff set out, that he had paid and taken up the defendant's note in April, 1843. The record disclosed that this suit was commenced in April, 1842.

On this state of proof, the court charged, (after giving instructions as what verdict ought to be rendered by the jury if they considered the notes as given for usurious interest,) that if the jury believed the note sued on was made by the defendant in consideration that the plaintiff agreed to pay the note of the former to Glover, that it was incumbent on the plaintiff to show, by proof, that he had paid it before bringing this suit. The plaintiff excepted to this charge, and it is now assigned as error.

Boyd, for the plaintiff in error, cited 8 Johns. 39; 10 ib. 412; 18 ib. 12; 9 Cowen, 639.

Hair, *contra*.

GOLDTHWAITE, J.—The charge of the county court to the jury cannot be suaintained. The statement of both the parties was before the jury, as evidence; and no exception having been taken to this course, we must consider it as receiving their assent. If the jury gave credence to the plaintiff, the consideration, then, of the note sued on, was the promise be him to assume, or in other terms, his agreement to pay, the debt due by the defendant to Glover's estate. The payment of this debt by the

plaintiff was not essential in aid of his right to sue upon this note. It is true, the defendant was entitled to his remedy for any injury sustained in consequence of the omission to pay it; but the right to do so previous to commencing the suit, did not impair the plaintiff's right of action.

The mere circumstance that the defendant is, as urged by his counsel, liable for two debts at the same time, where only one benefit has been received, is not so uncommon as to create any exception to general rules of law; and we doubt not a remedy would have been readily found if the plaintiff here had been incapable, by reason of insolvency, of taking up the note to Glover's estate. The cases of Olmstead v. Griesly, [28 Johns. 12], and Farley v. Cleveland, [4 Cowen, 432,] are quite conclusive to show, that the promise by the plaintiff to pay the debt to Glover's estate, was one which could be enforced against him; and, therefore, a sufficient considerasion for the notes given by defendant.

Judgment reversed, and cause remanded.

MONTGOMERY v. ELLIOTT, USE, &c.

1. An unincorporated body of individuals, issuing notes, are liable as partners, and therefore, under the statute of this State, the defence that the defendant had withdrawn from the association before the note sued on was issued, can only be given in evidence under the plea of *non est factum*.
2. Upon a suit on a note payable *on demand*, at a particular place, it is not necessary that the plaintiff should prove a demand at the place before suit brought. It is matter of defence for the defendant, if he was ready at the place, to pay.

ERROR to the Circuit Court of Fayette.

This action was commenced before a justice of the peace, by the defendant in error, on two notes, for twenty dollars each, in the following form.

The Real Estate Bank, No. 52, of Caledonia, Mississippi, pro-

mise to pay John Elliott or bearer, twenty dollars, on demand, at their banking house, Caledonia, Mississippi.—May 8, 1838.

W. G. WRIGHT, Pres't

R. DOWDLE, Cashier.

Judgment being rendered for the defendant, the plaintiff appealed to the circuit court, where judgment was rendered for the plaintiff.

Upon the trial, it appeared that the Real Estate Banking Company was an association of unincorporated individuals for the purpose of banking, and that the defendant was a member thereof, for a certain period—that the company issued notes, as bank notes, to be in circulation from time to time, as the board of directors might direct. That the defendant broke up his connection with the company, and was released on the 19th May, 1838. That the notes sued on, were not in fact made and put in circulation at the time they bore date; but after the defendant ceased to be a member of the company; which evidence was rejected, because no plea of *non est factum* was interposed, to which the defendant excepted.

The defendant moved the court to charge, that the plaintiff, to entitle himself to a recovery, must prove a demand at the banking house of the company—which the court refused, and he excepted.

The assignments of error, present for revision, the rejection of the testimony and the charge of the court.

PECK & CLARKE, for the plaintiff in error—cited 1 Stew't, 155.
HUNTINGTON, *contra.*—[2 Ala. Rep. 343, 705.]

ORMOND, J.—The case of Fowlkes & Co. v. Baldwin, Kent & Co. [2 Ala. 705,] is conclusive to show, that one sued upon a note as a partner, cannot introduce evidence to prove he is not a partner, unless he put the fact in issue by a sworn plea. The members of this company were liable as partners, upon the notes they issued. The proof offered to be made, was, that when this note was issued, the defendant had withdrawn from the company; that is, he had ceased to be a member of the firm, and was, therefore, not liable upon the note. This defence could only be made, by the statute of this State, under the plea of *non est factum.*

The question, whether a demand was necessary before suit, is one of considerable difficulty. Upon this subject, a great contrariety of opinion formerly prevailed in England, as to the necessity of averring and proving a demand as a precedent condition to the right to recover, when the instrument was made payable on its face at a particular time and place, or where it was accepted, payable at a particular place, which was finally settled on appeal to the House of Lords, that such demand was necessary in the case of Rozar v. Young, [2 Brod. and Bing. 180.]

In the United States, a different doctrine has generally prevailed, it being considered matter of defence, and therefore, not necessary to be proved by the plaintiff. [Wallace v. McConnell, 13 Peters, 133. See, also, Chitty on Bills, 9 Am. ed. 393, and Story on Bills, 416; and note, where the cases are collected.]

In this State, it has always been considered matter of defence, when the suit is against the maker or acceptor. The doctrine is so stated by Judge Saffold, in Irvine v. Withers, [1 Stew. 234;] and although it was not acquiesced in by the whole bench, it has been considered and acted on as settling the law from that time to the present. [Roberts v. Mason, 1 Ala. Rep. 373.]

The question in this case is, whether the same rule is to be applied where the note is payable on *demand* at a particular place. We are unable to perceive any substantial difference between the two cases. The same reasons which lead to the conclusion, that it is matter of defence when the note is payable at a specified time, at a particular place, apply with the same force when it is payable on demand. In either case, it is impossible that the defendant can be prejudiced, as he can always defend himself by proving that he was ready at the place appointed to pay the debt, and if not ready to pay, why should the plaintiff be required to do an unnecessary act. This question is considered at some length in the case of Huxture v. Bishop, [3 Wend. 13,] and the law considered to be as here stated.

The rule would be different where the suit is against an endorser, his contract being conditional to pay, if the maker does not on demand; a demand and notice is, therefore, necessary by the terms of his contract to fix his liability.

It results from the view here taken, that there is no error in the judgment of the circuit court, and it is therefore affirmed.

CAMERON v. STOLLENWERCK, AND ANOTHER.

1. The defendants being sued on a specialty, for the payment of four hundred dollars, pleaded in bar that they had been summoned as garnishees, at the suit of L. S. F., who had recovered several judgments against the plaintiff, before a justice of the peace, to state how much they were indebted to the latter; that they admitted they owed him two hundred dollars on the specialty, and no more, and their answer was contested before the justice, who after hearing the evidence, adjudged that the same was true. Several judgments were rendered by the justice against them as garnishees, amounting to the sum admitted to be due—all of which have been satisfied: *Held*, that the sum of two hundred dollars, the sum then in controversy, being beyond the jurisdiction of the justice of the peace, the inquiry as to the defendants' indebtedness, and the decision thereon, did not sustain a plea of "Former recovery," or in any manner affect the plaintiff's rights.

WRIT of error to the Circuit Court of Greene.

This was an action of debt on a specialty, for the payment of four hundred dollars. The defendants pleaded several pleas, among which was the plea of "former recovery." On the trial of an issue upon this plea, it was shown that the defendants were summoned as garnishees, at the suit of Lewis S. Fellows, who had recovered several judgments against the plaintiff, to appear before the justice of the peace who rendered them, and answer as to their indebtedness to the plaintiff. They appeared and answered, that they had executed the specialty on which this action is founded, set forth its consideration, and averred its failure as to two hundred dollars. Thereupon, the plaintiff in this action, gave notice to one of the defendants, that he would contest the truth of their answer, and the parties accordingly appeared before the justice, who, upon the answer and evidence of witnesses, determined that the garnishee was only indebted in the sum admitted by them. Several judgments were then rendered by the justice against the defendants as garnishees, amounting to the sum ascertained to be due by them to the plaintiff—all which they have fully satisfied.

The court adjudged, that the facts shown, formed a bar to the action, and rendered judgment for the defendants.

J. D. Webb, for the plaintiff in error.
J. Erwin, for the defendants.

COLLIER, C. J.—By the twenty-fourth section of the attachment law, it is enacted, that "the defendant may in all cases show, by competent testimony, that a garnishee is indebted to him in a greater amount than he is willing to admit on oath." [Clay's Dig. 60.] This provision is exceedingly imperfect, and is wholly unexplained by any other part of the act in which it is found. It is no where provided, that the defendant in attachment or execution, shall be permitted to negative the garnishee's answer, and thus form an issue to try its truth by a jury. This the plaintiff is permitted to do, by the twenty-fifth section of the law cited.—In this state of the legislation upon the subject, we have some difficulty in determining how we shall give effect to the twenty-fourth section; whether by determining that it is competent for the defendant to make up an issue with the garnishee, or that he is to come in aid of the plaintiff, when the latter has denied the truth of the answer. There are difficulties in the way of either conclusion, and as it may not be necessary in the present case to express a definite opinion upon the point, we waive its consideration.

We will not inquire, what would be the effect of a judgment upon the rights of the defendant, where the tribunal before which he litigated the extent of the garnishee's indebtedness, had jurisdiction of the case, if the defendant had been attempting to coerce a payment by suit. In the case before us, the justice might inquire into the amount in which the garnishees were indebted, and perhaps might to that end, receive testimony as to the justness of the objection interposed in their answer, to the payment of one half of their note. But such an inquiry would superinduce no consequences prejudicial to the defendant, beyond the determination of that particular cause, and whatever might be the judgment of the justice, it could not be pleaded as a bar to an action against the garnishees, except only as to the amount that had been condemned to the satisfaction of the plaintiff's demand. In fact, the jurisdiction of the justice would be limited to that point; and the decision of any other question of law or fact, would be regarded as *coram non judice.*

If the justice could conclusively adjudicate the rights of the

parties in a case of the kind, and absolve by his judgment, one who was *prima facie* a debtor, from the payment of two hundred dollars, his jurisdiction as to the amount, must be unlimited. Whenever they are permitted to adjudicate the rights of parties in civil cases, in which the amount in controversy exceeds fifty dollars,) the *maximum* prescribed by the constitution,) the judiciary can prescribe no other limit. But we have seen that the object of the inquiry was to ascertain the measure of the garnishee's indebtedness, that it might be known for what amount the plaintiff should have judgment against him, and not to foreclose future controversy between the latter and the defendant. It is needless to add more than declare that the judgment of the circuit court is reversed, and the cause remanded.

SORELLE v. ELMES.

1. A plea, asserting that the note sued on was executed by an attorney in fact, constituted by a written power authorising him to sign the name of his principal, so as to become binding, if the payee should give notice to the principal within 30 days next after the execution of the note, and averring that no such notice was given, is equivalent to a plea denying the execution of the note, and may properly be stricken out, unless verified by affidavit.

WRIT of error to the Circuit Court of Benton.

Assumpsit by Elmes against Sorelle, as the maker of a promissory note. The defendant pleaded, that the note was made by one S., acting under and by virtue of a written power from the defendant, to sign his name, but a clause was therein inserted, that no note executed by S. for his own benefit, should be binding on the principal, unless notice was given to him by the payee, within 30 days, next after the execution of the note, and the plea was, that no such notice was given in this case. This plea concludes to the country, but another to the same effect, concludes

with a verification. Both were stricken out on the motion of the plaintiff; this is the only error assigned.

T. A. WALKER, for the plaintiff in error.
No counsel appeared for the defendant.

GOLDTHWAITE, J.—These pleas amount to nothing more than a denial of an execution of the note sued on, in such a manner as to be binding on the defendant. It is an attempt to cast on the plaintiff the *onus* of proving the execution of the note without making the affidavit required to be made by the statute. [Clay's Digest, 340, § 152.] As the pleas were not supported by affidavit, they were properly stricken out on motion.

Judgment affirmed.

DAVIS v. CARLISLE.

1. The addition of the words "without defalcation or set-off," to a promissory note, without the consent of the maker, is a material alteration, but if made by a stranger, without the knowledge or consent of the payee or holder, will vitiate the note.
2. If it be shown that the alteration has been made, but it is not proved by whom, the jury may, in the absence of proof to the contrary, infer that it was made by the payee or holder, but the court cannot draw such inference as matter of law.

WRIT of error to the County Court of Perry.

Assumpsit by Davis, as indorsee of one William G. Davis, against Carlisle, as the maker of a promissory note. The defendant pleaded non-assumpsit, verified by oath.

The plaintiff, at the trial, produced a note in these terms:

"Without defalcation or set-off, there is due William G. Davis the sum of eight hundred and six 10-100 dollars, which is to be

paid without fail by the 1st or 15th day of November next, with interest from date. This October the 12th, 1842."

And proved the defendant's signature to it. The defendant then proved that the words, "without defalcation or set-off," on the face of the note, had been added thereto, prefixed, or marked, since the note was made and delivered to the payee, but when or by whom the witness could not say, nor was this shown by any other witnesses.

The defendant also produced and proved sets-off to a large amount against the payee of the note, held before notice of the assignment of the same.

1. On this state of proof, the plaintiff requested the court to instruct the jury, that the words, "without defalcation or setoff," added to or inserted in the note after it was signed, was not so material an alteration as would avoid it in the hands of the assignee. This was refused, and the jury charged, that these words, if inserted after the making and delivery of the note, and without the consent of the maker, would avoid it.

2. The plaintiff further requested the court to instruct the jury, that by introducing off-sets, the defendant recognized the validity of the alteration. This was refused.

3. The plaintiff also requested the court to instruct the jury, that unless the alteration was shown to have been made by the payee, or assignee, or by some person with their consent or knowledge, then the alteration, if any was made, did not vitiate the note. This was refused; and instead of it, the jury was charged, that if the alteration was made without the consent or knowledge of the defendant, then the alteration was material, and the note was not the note of the defendant.

These several charges and refusals are now assigned as error.

Thos. Chilton, for plaintiff in error, cited 2 Sheppard's Touchstone, 68; Brown v. Jones, 3 Porter, 420.

Davis, with whom was Graham, *contra*, cited, Greenleaf on Ev. 600, 565; Brown v. Jones, 3 Porter, 320; 1 N. H. 95, 145; 2 Am. Com. Law Cases, 228.

ORMOND, J.—We think it clear, that the words, "without

defalcation or set-off," were, if added without the knowledge or consent of the maker, an important alteration of the instrument. The right of set-off is given by statute, and attaches to every instrument when made. It is, however, certainly competent for any one to stipulate that he will not avail himself of it; and if he does, he will not afterwards be permitted to make an off-set against the note, either in the hands of the payee or his assignee.

It does not follow that a material alteration of a note, though without the consent of the maker, will render it void; if made by a stranger without the knowledge or consent of the payee or holder, it will not affect its validity. [Brown v. Jones, 3 Porter, 422.] When an alteration is proved, which, according to the law as above expounded, would render the instrument void, it devolves on the party seeking to enforce it to explain it by proving, either that the maker assented to it, or that it was made by a stranger without his knowledge; and if such explanation is not made, the jury will be authorized to infer that it was made by the holder, as he has it in possession.

Let us apply these principles to the case. The third charge moved for, "that unless the alteration was shown to have been made by the payee or assignee, or by some person with their knowledge or consent, that the alteration, if made, did not vitiate the note," was the law of the case, and should have been given to the jury. The presumption or inference, that it was made by the payee or assignee, in the absence of proof to the contrary, was one which the court could not make, but which it was the peculiar province of the jury to determine. That there was no proof by whom the alteration was made, would have justified the jury in drawing such an inference, and, doubtless, if so instructed, they would have so determined; but the charge of the court deprived them of the power of considering the fact by treating it as matter of law. In so doing, the court invaded the province of the jury; and for this error, the judgment must be reversed, and the cause remanded.

CARWILE v. HOUSE.

1. Although the copy of a record is evidence, yet if the original is produced it is alse admissible, and may be used instead of a copy.
2. In an action of trespass to recover the possession of land, the declaration may be in the usual form of trespass *quare clausum fregit;* the statute requires the indorsement on the writ to inform the defendant "that the action is brought as well to try titles, as to recover damages."
3. Where an action is brought to recover the possession of several adjacent tracts of land, which the plaintiff claims as a purchaser under execution, with a sheriff's deed, it is error to charge the jury that if the defendant was in possession of any parcel or tract of the land in question, they should find for the plaintiff for all the lands lying contiguous thereto described in the declaration and the sheriff's deed.

WRIT of error to the Circuit Court of Autauga.

This was an action of trespass, *quare clausum fregit,* at the suit of the defendant in error. The declaration is in the usual form, but the indorsement on the writ states, that the action is brought as well as to try titles to sundry quarters of a quarter and half quarter sections of land (particularly described) as to recover damages for the detention of the same. The cause was tried on the plea of "not guilty," and certain questions of law, arising at the trial, were duly reserved by bill of exceptions at the instance of the defendant. It is shown that the plaintiff offered as evidence two *original* writs of *fieri facias,* which had issued from the court of chancery at Columbiana, at the suit of Jacob P. House against Zachariah B. Carwile. To the admission of these executions, the defendant objected, on the ground that they had been returned, thereby became records of the court of chancery, and could not be used as evidence of the facts they tended to prove; but his objection was overruled, and the *fi. fas.* read to the jury.

The plaintiff then proposed to prove that the lands in question had been sold under the executions, and to read the sheriff's deed for the same; but the defendant objected, on the ground that it was not allowable to give evidence of the title to lands under the

declaration, nor recover the possession of the same; this objection was overruled.

The court charged the jury, that if they believed from the evidence that the defendant was in the possession of any parcel or tract of the land in question, then they should find in favor of the plaintiff for all the lands lying contiguous thereto, described in the declaration and the sheriff's deed. Thereupon, the jury returned a verdict for the plaintiff, and judgment was rendered accordingly.

J. W. Pryor, for the plaintiff in error.
————, for defendant.

COLLIER, C. J.—1. It has been held as often as the point has been made, that although the copy of a record is admissible evidence, yet the original may be used where the party produces it. We can very well conceive why the copies of records and other public documents should be adjudged competent, but no reason suggests itself, why, if the original be present, it should not be equally satisfactory to establish the facts which it discloses. The argument of the counsel for the plaintiff in error would exclude the executions because they are records, and should not be removed from their proper depository. It may be true that the register of the court of chancery should not have allowed them to have been taken from his office; be this as it may, we have seen that their removal, though improperly permitted, cannot effect them as instruments of evidence.

2. The act of 1821, authorizes the title to lands to be tried by an action of trespass, "in which the plaintiff shall indorse on his writ and copy-writ, that the action is brought as well to try titles as to recover damages." Here, the plaintiff has made the indorsement which the statute requires, and this according to the practice which has prevailed ever since its enactment, has been regarded as sufficient, without indicating by the declaration that the plaintiff's purpose is to recover the possession. Indeed, we think no other conclusion could have been attained; for the act itself declaring that the action of trespass shall be the proper remedy, it must have been intended that the pleadings should be framed as at common law. That the defendant may be advised of the object proposed, the plaintiff informs him by the indorsement on

the writ, that the title is to be tried to the lands on which the wrongful entry is made. In such case, the indorsement of the writ will be looked to, to determine the character of the action, and thus show what is the matter in controversy. [Clay's Dig. 320, § 43.]

3. We think the court erred in the charge to the jury, unless there were facts to warrant it, of which the record does not inform us. In Blackburn v. Baker, et al. [7 Porter's Rep. 288,] we said, "that the occupancy of eighty acres of land cannot draw to its occupancy the adjoining eighty acres, though unoccupied, and a part of the same quarter section. Otherwise, we must suppose not only that an appropriation by metes and bounds, or an inclosure, was not necessary, but that he who acquires one subdivision of land has also become the purchaser of another subdivision." The bill of exceptions does not state that the defendant ever was in possession, either actually or by construction, of any "parcel or tract" of land, except that of which he had the *pedis possessio*. It does not appear that the defendant was a party to the execution, when his possession commenced, or what was its character, or whether any or what claim he set up to any part of the land. Under these circumstances, the presumption cannot be indulged, that because one occupied a forty or eighty acre tract, that his possession embraced other contiguous subdivisions. For the error of the circuit court in thus laying down the law, its judgment is reversed, and the cause remanded.

DORE v. DAWSON.

1. When a debt due by promissory note is attached by garnishee process, the service creates a lien upon the debt, which cannot be defeated by a subsequent *bona fide* transfer by the payee of the note to a third person, notwithstanding the entire ignorance of the assignee of the process or its service.

WRIT of error to the County Court of Mobile county.

Dore, in March, 1841, obtained judgment in the county court of Mobile county against Purvis & Andrews. Upon this, he sued out garnishee process on the 11th March, 1843, against Hannah Gibson, Ira P Taylor and William Taylor, returnable to the then next June term. This process was served on all the garnishees the 13th March. The garnishees did not appear at the return of the process, and judgment *ni. si.* was then given against them. After service of *sci. fa.*, Ira P. and William Taylor appeared and answered, that in the month of February, 1843, they executed their joint note to Purvis & Andrews or order for 1260 dollars, or thereabouts, payable 1st January, 1844; that they had been informed and believed that the note had been transferred by Purvis & Andrews to one Dawson, having been notified by him of the fact; but when the note was transferred, or for what consideration, they were ignorant. After this answer, the court ordered notice to be given to Wm. Dawson to appear and maintain his claim to the note. Upon his appearance, a statement of facts was agreed upon, and submitted to the court for its judgment. The statement is this: Ira P. Taylor and the other garnishees, on the 21st February, 1843, made their joint note for 1274 76-100 dollars, payable the 1st of February next thereafter, to Purvis & Andrews or order. Purvis & Andrews were indebted to Dawson in the sum of 4,000 dollars, and had been for more than two years; when they, in April, 1843, transferred and assigned this note, *bona fide* and absolutely, to him, in part payment of his demand, without notice of the garnishment or of any other defence to the note. The county court rendered a judgment discharging the garnishees; and this is now assigned as error by Dore.

Dargan, for plaintiff in error.
Gibbons, *contra.*

GOLDTHWAITE, J.—The right of the creditor in this case, seems to us to be very clear. The garnishee process was served on the 13th March, 1843; at which time Purvis & Andrews were the owners as well as the payees of the note. The service of the garnishment upon the debtor operated as a lien upon the debt, which could not be affected by any subsequent assignment. In giving effect to the law of attachment, there is no

difference between debts and personal chattels; and a lien once obtained by service, cannot be discharged by the act of the debtor. It appears that the assignment to Dawson was not made until the month after the debt was attached.

This being the case, he is without any valid title to the note, as the capacity of Purvis and Andrews to assign it had been destroyed by the service of the garnishee process.

Judgment reversed, and remanded.

CAWTHORNE v. WEISINGER

1. A writ of error cannot be prosecuted upon the settlement of an insolvent estate, until a final decree is made, but any creditor who may conceive himself injured by a rejection of his claim, may, by *certiorari* remove the record into the circuit court, and have the question re-considered; and for the improper admission of a claim, the remaining creditors may also seek redress in the same mode.
2. A co-maker of a promissory note is a competent witness to prove a presentment of the note to the executor of a joint maker of the note.
3. The time within which claims can be presented to an executor or administrator, is computed from the date of the grant of letters testamentary, and not from the date of the executor's advertisement.
4. A presentment may be made within eighteen months, though the estate is declared insolvent.

ERROR to the County Court of Perry.

This was a proceeding before John R. Goree, Isham W. Garrett and John Lockhart, commissioners appointed by a judge of the circuit court to settle the estate of David Yarbrough, the judge of the county court being incompetent to sit from interest. The estate having been previously reported insolvent, the plaintiff presented a note for $5,000, executed by the deceased, for allowance. The claim had been filed in the clerk's office; and to prove a presentment to the executor within eighteen months after the grant of letters testamentary, offered as a witness, James C.

Harrell—the note being executed by him, Howze, Plummer & Co., Henry Y. Howze, W. B. Benson, and the deceased—but the court, on motion of defendant in error, rejected him as an incompetent witness. The plaintiff also offered to prove a presentment within eighteen months after the advertisement of the executor, which the court refused, and rejected the claim; to which the defendant excepted. From this judgment of the court, this writ is now prosecuted by the creditor against the executor; and assigns for error the rejection of the claim.

Davis, for plaintiff in error, insisted that this was a final decree of the county court, upon which a writ of error would lie. That the co-maker of the note had not such an interest as would disqualify him from being a witness. [1 Philips on Ev. 67; 2 id. 168.]

T. Chilton, *contra.* This is not such a final decree as a writ of error will lie from. No final decree has yet been made in the case. It does not appear that the court was properly constituted. The witness was clearly incompetent, if the court can examine the merits of the case.

ORMOND, J.—In Woodruff v. The State Bank, [4 Ala. 292,] we had occasion to consider the statute under which the commissioners were appointed in this case; and it was then held, that when the commission was entered of record upon the minutes of the county court, they were invested with all the powers conferred by law on the county judge. That they were in effect *quoad* that particular case, the county court. All their proceedings are, therefore, to be tested by the same rules as if performed by the county judge, when their authority to act as such in the particular case is shown upon the record. Such is the fact in this case; and we will, therefore, proceed to inquire, first, whether the action of the court in rejecting the claim was correct; secondly, what remedy has the creditor to correct the erroneous action of the court in a case like the present.

The witness who was offered to prove the presentment of the claim, appears to have been the first maker of a joint note, and was offered by the payee to prove a presentment of the note to the executor of one of the joint makers. It was argued at the

bar, that from the position of the name of the witness on the note, he being the first signer, it was fair to presume that he was the principal, and the other makers his sureties. No such inference can be drawn from that fact merely; but we are of the opinion, that whether the deceased was a surety for the witness or a joint maker of the note, in either event the witness was competent. As joint maker, he would be liable to the payee for the whole, if the claim was not sustained, and to the deceased for contribution if it was sustained. If he was the principal and the deceased a surety merely, his interest would be precisely balanced. If the creditor succeeded, he would be liable to the estate of the deceased, whilst his liability to the creditor was ascertained by the instrument itself. The case of York v. Blott, [5 M. & S. 71,] is expressly in point; and such has been the course of decision in this court.

It may be supposed, that considered as a joint maker of the note, he had an interest in fixing the liability of the deceased; as, otherwise, he might have the whole to pay himself. But although the payee may have lost his right to proceed against the estate of the deceased, by his omission to present the note to the executor within eighteen months after the grant of letters testamentary, if the whole should be recovered against the witness as maker, he would have a right to proceed against the estate of the deceased for contribution; as his right to contribution would arise from the payment of the money, and would not be affected by the omission of the payee to present it in time. This is the principle of the case of McBroom v. The Governor, [6 Porter, 32.]

The court correctly excluded the proof of presentment after the lapse of eighteen months from the grant of letters testamentary, though that period had not elapsed from the date of the executor's advertisement. The time is to be computed from the date of the grant, and is not affected by the date of the advertisement. Thrash v. Sumwalt, [5 Ala. 13,] where it was held, that the direction to the executor to make advertisement was directory only, and that it did not affect or operate upon the statute of non claim. Nor did the fact that the estate was declared insolvent vary the case, or supersede the necessity of due presentment.

From this examination, it appears that the court erred in the

exclusion of the witness, and the remaining question is, what redress is afforded by law to the creditor?

On the 9th February, 1843, [Clay's Dig. 192, from section 2 to 15,] the Legislature passed an act which, from the comprehensiveness of its details, will enable parties to seek the redress they may be entitled to for an injury in the settlement of an insolvent estate which, before the passage of that act, was certainly involved in great obscurity. This estate was declared insolvent before the passage of that act, and must, therefore, be governed by the law then in existence.

What is the character of the order made in this case? It is certainly final in its character, as it disposes definitely of the claim of the creditor. On the other hand, it is only the decision of the court upon a particular matter in the settlement of an account in which all the other creditors have an interest. It could not be tolerated on the one hand, that each creditor should have the right to his writ of error, and thus split the cause into possibly a hundred fragments. Yet on the other hand, as the decision upon each particular claim is personal to that particular party, and as its decision affects the entire settlement by augmenting or diminishing the share of each of the others, it is highly desirable that some mode should exist by which an improper decision should be corrected, and the distribution proceed upon correct principles.

A *mandamus* would be improper, as that writ will not lie to reverse the judgment of a court of record, and a *certiorari* seems to he the only proper remedy, as that is said to lie in all cases where a writ of error cannot be prosecuted. Where a new jurisdiction is created by statute, and the court or judge exercising it, proceeds in a summary method, and not according to the course of the common law, a *certiorari* is the only proper remedy. [Richlaw v. Commonwealth, 5 Binn, 26; Bull v. Brigham, 5 Mass. 406; Commonwealth v. Ellis, 11 id. 465; Huse v. Grimes, 2 N. H. 208. And see also 1 Bac. Ab. 558, A.]

We think, therefore, that a writ of error can only be prosecuted after a final decree upon the insolvent's estate, and that all the parties to the decree must be parties to the writ. That any creditor who may conceive himself injured by a rejection of his claim, may, by *certiorari*, remove the record into the circuit court, and have the question reconsidered; and for the improper

admission of a claim, the remaining creditor may, also, seek redress in the same mode.

The result of our examination is, that the writ in this case was improperly sued out; and it must, therefore, be dismissed.

CARPENTER v. DEVON, ET AL.

1. The relation of principal and surety continues, even after the rendition of a judgment against them, so as to entitle the latter to insist upon his discharge when without his consent, the creditor agreed to indulge the former upon a sufficient consideration.
2. The surety alleged in his bill, that the creditor indulged the principal *without the complainant's consent*; the defendant answered, that the indulgence was given with the surety's consent: *Held*, that the negative averment was not only proper, but necessary, yet it was pleading what it was not incumbent on the complainant to prove, but the defendant should prove the reverse, and his answer would not be evidence to establish the fact for him.

WRIT of error to the Court of Chancery for Montgomery.

In June, 1842, the complainant filed his bill, stating, that Atkins McLemore and Anderson W. Mosely, in the circuit court of Montgomery, recovered a judgment against John W. T. Reid, for the sum of twenty-seven hundred and eighty-seven dollars and sixty-four cents, and costs; that the defendant in the judgment, together with the complainant and Edward Hanrick as his sureties, executed a bond; conditioned for the prosecution of a writ of error to the June term of the supreme court, holden in 1841; and the judgment of the circuit court was affirmed against Reid and his sureties.

It is further stated, that upon the affirmed judgment, an execution issued against Reid, Hanrick and complainant, and Reid made an arrangement with Wm. Devon, in which John Knox and Thomas Brown are equally interested, as complainant is informed and believes; by that arrangement, Devon agreed to pay the amount due on the execution, to McLemore and Moseley,

take an assignment of the judgment and execution, and allow Reid sixty days, within which to pay the same, the latter agreeing to pay to Devon for such indulgence, one or two hundred dollars in addition to the legal rate of interest—all which, it is alleged, was without the knowledge or consent of the complainant.—It is then charged, that Devon, under this arrangement, paid to the plaintiffs in the judgment, the amount due thereon, received an assignment of the same, and directed the execution to be returned, stayed by his order.

The complainant then alleges, that after the expiration of the sixty days, an *alias* execution issued upon the judgment against Reid, Hanrick and the complainant, and another agreement was then made between Reid and Devon (Brown and Knox being equally interested therein) by which the latter agreed to give Reid further indulgence upon the execution; but for what time, is unknown to the complainant. In consideration of this latter indulgence, Reid agreed to pay Devon at the rate of two and a half per cent. per month, on the amount of the execntion; and in pursuance of such agreement, the execution was returned stayed by the latter—all which was without the knowledge or consent of the complainant.

It is alleged that Hanrick and Reid are insolvent, and that the former refuses to join with the complainant in this suit: *Further*, that Devon alone, or in conjunction with Knox and Brown, have caused another execution to issue, which they are about to levy on, and collect by a sale of the complainant's property. The bill prays an injunction so far as the complainant's property is concerned, against any execution issued upon the judgment against Reid, Hanrick and the complainant, that *subpoenas* may issue for McLemore, Mosely, Reid, Hanrick, Devon, Knox and Brown; and that such relief as is proper may be granted.

The defendant Devon, in his answer, admits the recovery of a judgment by McLemore and Mosely against Reid; the prosecution of a writ of error by the latter, and the affirmance of judgment against him, and Hanrick and the complainant as his sureties; and that he did on the behalf of himself and his co-defendants, Knox and Brown, make the arrangement with Reid to pay the judgment, and allow him sixty days to satisfy the execution; for which Reid paid him the sum of three hundred and forty-two dollars and twenty cents. He positively denies that the arrange-

ment was made without the knowledge and consent of the complainant; but affirms the reverse to be true. He admits that the judgment was assigned to his co-defendant, Brown, but denies that he ever made any other agreement by which execution was suspended, than as above stated. It is stated, that after or about the time an alias execution issued, N. E. Bensen, trustee, in a deed executed by Reid to secure the debts and liabilities of the latter, advertised some of the property embraced therein, to be sold on the 14th of February, 1842; on that day the trustee wished to postpone the sale, with the view of obtaining a better price, and this defendant, for himself and Knox, signed a paper requesting the sheriff to stay proceedings for the present, on the execution against Reid and his sureties. This instruction was given without any consideration, which would have prevented him from pressing the execution at any time. The defendant admits, that another execution has issued on the judgment, that Reid and Hanrick are both insolvent, and avers that the former was, at the time the judgment was assigned. He concludes his answer by demurring generally to the bill.

The answers of Knox and Brown, are substantially the same as Devon's, save only that they answer to a great extent, upon information derived from others, and their own belief.

Mosely answered the bill, admitting the assignment of the judgment, but declaring his ignorance of the matters alleged, which affect his co-defendants. Hanrick denies all knowledge of the several matters in controversy, &c.

The depositions of several witnesses, as well as other testimony, appear in the record. These, with the exception of Reid, show the recovery of the judgment as stated in the bill, its affirmance by the supreme court against Reid, Hanrick and the complainant; and that an execution issued against them, which the former, by an arrangement with Devon, as stated in the answer of the latter, caused to be stayed. It is further shown, that Devon, Knox and Brown, with other judgment creditors of Reid, caused an alias execution, which issued on the judgment in question, to be stayed, and for that purpose, gave an order to the sheriff on the 14th February, 1842. But it is not shown by any evidence, that the complainant did or did not, assent to the indulgence that was given to Reid.

The deposition of Reid, was taken at the instance of the com-

plainant, although Devon, Knox and Brown, objected to it, on the ground that he was a party to the suit. Witness denies that he is a party, and insists that his interest in the event of the cause, as between the complainant and the three defendants last named, is balanced. He states that about the period the first indulgence expired, viz; about the 13th January, 1842, the execution was stayed for the further term of sixty days, for which he has paid Devon the same sum paid for the previous stay; the aggregate of which several sums amount to $684 40, which was deducted from the proceeds of witness' cotton crop. No consideration was paid for the order given to the sheriff on the 14th of February, 1842.

It appears from the evidence, that Reid had not property which could be sold under execution after February, 1841.

The chancellor was of opinion that the allegation in the bill, that the indulgence given to Reid, was without the complainant's knowledge or consent, was material, and such as the defendants were bound to answer; and that the answers of Devon, Knox and Brown, were conclusive upon the point, as they were not disproved by the evidence in the cause. *Further*, although the complainant was a surety in the bond for a writ of error, yet, after the judgment was affirmed against him, he became a principal, and a contract with Reid, by which the latter obtained a longer time than the law allowed to satisfy the judgment, would not discharge him; that if the complainant had satisfied the judgment, it would be extinguished, and he could not consequently enforce it, in order to reimburse himself. The chancellor then concluded, 1. That the bill does not contain sufficient matter to warrant the interference of equity. 2. Conceding that the case could be entertained, it was not made out by proof. It was, therefore, adjudged and decreed, that the bill be dismissed with costs.

T. Williams, for the plaintiff in error. The relation of principal and surety, continues as well after as before judgment. [Clay's Dig. 206, § 23; 3. J. J. Marsh. Rep. 526; 2 Am. Eq. Dig. 403, § 16; 3. Bibb's Rep. 467; 10 Johns. Rep. 587; 5 H. & Johns. Rep. 234; 1 Dess. Rep. 214; 3 Leigh's Rep. 272; 1 Hill's N. Y. Rep. 652; 3 Munf. Rep. 417; 4 H. & Munf. Rep. 436; Rice's Eq. Rep. 283–4; 2 Stew't Rep. 63; 3 id. 14; 8 Serg't & R. Rep.

452; 1 Dess. Rep. 409; 1 Penn. Rep. 149, 240; 7 J. J. Marsh. Rep. 580; 5 Ohio Rep. 212; 3, Ala. Rep. N. S. 339.]

A surety who pays a judgment, is entitled in equity to have it assigned to him, and if the creditor places himself in a situation. that he cannot make the assignment, the surety must be discharged. [2 Vernon's Rep. 608; 3 Wheat. Rep. 520; 4 J. J. Marsh. Rep. 440; 17 Johns. Rep. 390–4; 10 Yerger's Rep. 310; 4 Leigh's Rep. 625; 1 Stew't Rep. 262; 1 Story's Eq. 477–8–480–1.]

The statement in the bill, that the agreement to indulge Reid, was without the knowledge and consent of the complainant, was an immaterial averment which need not have been proved; the answer of Devon, denying this allegation and asserting that the reverse was true, is not evidence, because not responsive to a material allegation. [6 Porter's Rep. 182–3; 2 Ala. Rep. 215–6; Story's Eq. Plead. 514, 435; Gresley's Eq. Ev. 288–9; 2 Phil. Ev. 477, 490–1; 1 Munf. Rep. 373; 1 Johns. Rep. 587; 1 Wash. Rep. 224; 3 Dana's Rep. 498; Hardin's Rep. 538; 6 Yerger's Rep. 113; 2 Johns. Ch. Rep. 92–3, and note; 1 H. & Gill. Rep. 11; 3 Monr. Rep. 367; 3 Cond. Eng. Ch. Rep. 335–9.]

The answer of Knox is defeetive, in not setting out the facts from which it may be inferred, that the complainant was informed of, or consented to the arrangement. In affirming that the complainant had notice, &c. the answer goes beyond the allegation. [4 Stew't & P. Rep. 415; 1 Beatty's Ch. Rep. 277; 1 Moll. Rep. 359; Story's Eq. Plead. 32, 653; 3 Cond. Eng. Ch. Rep. 339; 4 id. 327; 2 Ball. & B. Rep. 385.] The bill does not assert that the complainant's want of notice, was a matter about which the defendants were informed.

Devon's answer is not evidence for Knox and Brown,—if his testimony was material, they should have taken his deposition.—As it respects the answers of Knox and Brown, they do not state facts from their own knowledge, and they will be overbalanced by the testimony of a single witness. [1 Bibb's Rep. 200; 4 id. 358; 1 Dana's Rep. 474; 1 Paige's Rep. 209; 5 Munf. Rep. 183; 4 J. J. Marsh. Rep. 213; 4 S. & P. Rep. 410.]

N. Harris, for the defendants.—The affirmance of the judgment by the supreme court against Reid, Hanrick and the complainants, destroyed the relation of principal and surety, and made them all principals. [18 Eng. C. L. Rep. 273; 1 Story's Eq. 477, and cases cited in note 3; 5 Johns. Ch. Rep. 305; 3

Wheat. Rep. 520; 2 Bailey's Rep. 551; 2 Dev. Rep. 341; 4 id. 351, 529; 2 Iredell's Rep. 216; 4 Harrison's Rep. 112; 3 Ala. Rep. 310.] The law is the same, whether the party is a surety, technically so called, or merely an indorser. [Theobald on Prin. and Surety, 125; 4 Wend. Rep. 560; 8 Porter's Rep. 371.]

Devon was bound to answer the allegation, that Reid was indulged without the complainant's knowledge—he has denied it positively, and to entitle the complainant to a decree in his favor, he must disprove the denial. The answers of Knox and Brown, are made upon information and belief, and this is sufficient to throw upon the complainant the burthen of sustaining his bill.—[4 Johns. Ch. Rep. 65; 4 Paige's Rep. 368; 4 Ala. Rep. 60; 1 Cow. Rep. 712; 2 Conn. Rep. 11 Wend. Rep. 343; Harper's Eq. Rep. 197, 2 Stew't Rep. 301; 7 Ves. Rep. 587; 1 Wend. Rep. 583; 3 id. 552; 6 id. 22, 30; 3 Ala. Rep. 458.] The second indulgence to Reid, was without consideration, and the sureties cannot avail themselves of it as a discharge. [12 Wheat. Rep. 554.]

The evidence in the cause, so far from disproving the answers, tends strongly to sustain them.

COLLIER, C. J.—The material questions arising in this case, may be thus stated: 1. Does the relation of principal and surety cease upon the recovery of a judgment against them, so as to prevent the latter from insisting upon his discharge in consequence of an indulgence given to the former without his consent, under a contract with the creditor? 2. Where the bill filed by a surety states, that the creditor suspended execution upon his judgment, under a contract with his principal, without the sureties' knowledge or consent; and the answer denies that the indulgence was given without the complainant's knowledge or consent; and affirms the reverse to be true, on whom does the *onus* lie of proving the sureties' assent to the agreement?

1. In Lenox v. Prout, [3 Wheat. Rep. 520,] it was determined, that where a judgment has been recovered against the maker and indorser of a promissory note, the plaintiff may countermand execution, against the former, without exonerating the latter from liability. "And the reason," say the court, "is obvious; for, by the judgment, they have both become principal debtors, and if the indorser suffers any injury by the negligence of the judgment creditor, it is clearly his own fault, it being his duty to

pay the money, in which case he may take under his own direction, the judgment obtained against the maker." [See, also, 18 Eng. C. L. Rep. 273.] So in Bay v. Tallmadge, [5 Johns. Ch. Rep. 305,] it was decided, that after judgment against bail, their character of surety is at an end, and they cannot claim any advantage of the creditor, on the ground of a want of due diligence in prosecuting the principal debtor, or giving him indulgence upon a valid consideration. We might add other citations in accordance with those made, but this is entirely unnecessary, as will be seen from the view we take of the case.

In The Commonwealth v. Miller's Adm'rs, [8 Serg't & R. Rep. 452,] the court said, "there is no clearer rule in equity, than that where the creditor has the means of satisfaction in his hands, and chooses not to retain it, but suffers it to pass into the hands of the principal, the surety can never be called on." *Again:* "But it is said, the distinction between principal and surety ceases after judgment bas been obtained on the original security, and that as to subsequent transactions, equity views them with equal favor. If that be so, I am ignorant of any authority that bears it out; and on the ground of reason, it certainly cannot be supported. The distinction is carried throughout." So it has been held, that a stay of execution by a creditor, after a levy of it on the property of the principal will exonerate the surety, if the lien resulting from the levy be extinguished, and the surety did not approve of the indulgence. *And further*, that the discharge of the surety is not less complete, though the property levied on was insufficient to discharge the whole debt. [Sneed v. White, 3 J. J. Marsh. R. 526.]

The indulgence of the principal to the prejudice of the surety, by one of several equitable proprietors of an execution, it seems would operate a release of the surety, to the extent of the interest of the party indulging. [Givens v. Briscoe, 3 J. J. Marsh. Rep. 534.] And it has been also determined, that the stay, by the creditor, of an execution levied on the property of the principal debtor, without the privity or consent of the surety, will discharge the latter. [Jones v. Bullock, 3 Bibb's Rep. 467. See, also, Solomon v. Gregory, 4 Harrison's Rep. 112.]

In Comegy's and Pershouse v. Booth and Bell, [3 Stew't Rep. 14,] no distinction was attempted to be made between the rights of a surety, before and after a judgment against the principal and

himself; and in that case, the surety was released, because time was given to the principal after a judgment had been rendered upon the original security. In fact, it has been the understanding, both of the bench and the bar in this State, (as indicated by several adjudged cases,) that the relation of the parties continues as it was in its inception, notwithstanding the recovery of a judgment. Such would appear to be the conclusion of reason, and we believe is well sustained by authority. It may be also remarked, that the legislature seem to recognize this to be the rule of law, for the act of 1811, "to empower securities to recover damages in a summary way," enacts that, "when an execution may issue against any principal and security, on any bill, bond, note, or other instrument, the sheriff, or other officer, shall levy on the property of the principal first, if he has any property in the county where the security resides, &c." [Clay's Digest, 206, § 23.]

2. It is conceded, that an affirmative allegation in an answer irresponsive to the bill, but in avoidance of some statement, cannot be regarded as evidence for the defendant. But it is insisted, that as the complainant has negatively averred his ignorance of the agreement between Devon and Reid, by which time was given to the latter, and has denied that he assented to it, the answer of Devon in affirming the reverse to be true, is responsive to the bill, and unless disproved according to the rule recognized in chancery, must prevail. The justness of this conclusion must depend upon the fact, whether the complainant's case could be aided by any answer that could be made to the allegation. Mr Justice Story says, "one test of materiality, is to ascertain whether, if the defendant should answer in the affirmative, the admission would be of any use to the plaintiff in the cause, either to assist his equity, or to advance his claim to relief. If it would, it must be answered, for it is material; if not, it is immaterial, and need not be answered." [Story's Eq. Plead. 655.] Again, says the learned author, "every bill presents a statement of facts, and a claim of right on the part of the plaintiff, in regard to which, he seeks relief; and it further seeks a discovery from the defendant, in order to establish or aid in the proof of such facts and claim of the plaintiff. Now to such discovery, at least so far as the facts and claim constituting the plaintiff's case are concerned, he has an unquestionable right. The rule has been laid down by a very

able writer in the following terms. "It is the right as a general rule of the plaintiff in equity (as we have seen) to examine the defendant upon oath, as to all matters of fact, which being well pleaded in the bill, are material to the proof of the plaintiff's case, and which the defendant does not by his form of pleading, admit." [Id. 514, 435.]

It would not be a good plea for a surety sued at law, to allege that the creditor under a contract with the principal debtor, had extended the day of payment; but it should go farther, and aver that the indulgence was given without the consent of the defendant. This point was expressly so adjudged in the Bank of Steubenville v. Carroll's adm'rs, [5 Ohio Rep. 207.] And as both facts must concur in order to perfect the defence, it would seem to be unquestionable upon principle, that the plea should be sufficiently broad to embrace them in its allegations.

Now, although it is a general rule that the *allegata* and *probata* must correspond, and that a party need not allege more than he is bound to prove; yet the rule is not of universal application.—Sometimes a party is required to negative the existence of a fact, the *onus* of proving which, rests upon his adversary. And such is the case where the surety sets up as a defence, an extension of the time of payment by the creditor, to his principal. The case of Everett, et al v. The United States, [6 Porter's Rep. 166,] maintains, that where the surety proves that time was given to the principal, it is incumbent upon the creditor to show, that the former assented to it; and that such an inference cannot be indulged in the absence of proof. And that such is the law, is the clear deduction both from principle and authority. The party averring the non-existence of a fact will not as we have seen, be always bound to support the allegation by evidence—in fact, the difficulty of establishing a negative, will sometimes relieve him from the necessity; and in other cases, the justice of requiring the opposite party to show the affirmative, if it be true, will throw the *onus* upon him. [2 Phil. Ev. C. & H's notes, 483–4–5–6–7; The State v. Gaus, 9 Porter's Rep. 633; Blann v. Beal, 5 Ala. Rep.]

Now, if it is necessary to allege in a plea at law, that the surety did not consent that the principal should be indulged, it must be equally essential to a bill where the surety seeks relief in equity to make such an allegation. But this averment is necessary,

only to prevent a demurrer from being successfully interposed; and when the surety has proved that time was given to the principal, it is (as at law) incumbent upon the creditor to show that the former assented to it.

The defendant, Devon, need not have answered the negative averment of the bill, and his answer cannot, in this respect, be received as evidence against the complainant; because, if he had answered in the affirmative, the admission would not have been of any use to the plaintiff, "either to assist his equity, or to advance his claim to relief," or in any manner material to the proof of his case—though it may have estopped the defendant.

The case of the Branch Bank at Huntsville v. Marshall, et al. [4 Ala. Rep. 60.] is not analagous in principal with the case before us. There, the bill perhaps stated more than was necessary to give the court jurisdiction, or to present the complainant's case fairly; yet, the unnecessary allegation was pertinent, and so stated as to make it a material part of the plaintiff's case. Its admission by the defendants would have relieved the complainant from what, by the frame of its bill, it had undertaken to prove—in fact, it was an allegation that required an answer.

Our opinion upon both the points made, is, that the chancellor erred; the decree of the court of chancery is consequently reversed, and although, perhaps, a final decree might be here rendered, we think it the safer course, and accordingly, direct that the cause be remanded.

LANGDON v. LOCKETT.

1. The register of a court of chancery is subject to garnishee process, with respect to a surplus remaining in his hands belonging to the defendant in chancery, after sale of property to satisfy a mortgage decree, although the sale has not been confirmed, and although he is described by the decree to report his doings at the next term of the chancery court.

WRIT of error to the Circuit Court of Perry.

Garnishee process against Lockett, as the debtor of the Madison College, against which the Langdons had obtained a judgment.

The garnishee answered, that at a term of the chanchery court for the 20th district, held on the 3d Monday of June. 1843, he, as register and master of the said court, was ordered to sell the lands of Madison College, for the purpose of paying one Brumby, administrator of Wallace, the amount decreed by that court on a mortgage; and to report to the then next term, to be held on the 3d Monday of June, 1844. The amount remaining in his hands after paying Brumby the amount of the decree and costs, was $143 70. A bill was filed on the 27th November, 1843, in the office of the register of that court, praying an appropriation of the money so remaining in the garnishee's hands, to another and different person. On this answer, the court rendered a judgment, discharging the garnishee, and this is now assigned as error.

Graham, for the plaintiffs in error—insisted that the garnishee was not within the decisions, that an officer of court cannot be garnisheed, inasmuch as he held the overplus as money of the defendant in execution; and might at any time be sued for it by the corporation. [2 Ala. Rep. 253; 3 ib. 312; 4 Porter, 167; Clay's Digest, 304; 1 McMullen, 92; 5 Mass. 271; 2 L. & P. 15; 13 Perters, 151.]

Davis, *contra*—argued that the reason of all the decisions is, that an officer of court is not permitted to be drawn into another forum, to contest any matter respecting money collected by him; and that reason applies equally to the matter of a residium. Until the action of the chancery court, it is impossible to say whether the money, in the hands of this garnishee, belongs to the defendant in execution, or to the purchaser, inasmuch as the sale may be set aside.

GOLDTHWAITE, J.—We have several times had before us, the question here, for individuals connected as officers with courts of justice, are liable to process of garnishment from other courts. Thus we have held that a sheriff cannot be garnisheed for monies collected, at the suit of a creditor of the plaintiff in

execution. [Zurcher v. Magee, 2 Ala. Rep. 253.] Also, that an attorney or justice of the peace, having collected money in their respective characters, may be garnisheed. [Mann v. Buford, 3 ib. 312; Clark v. Boggs at this term] It is argued by the counsel for the defendant in error, that an officer of one court cannot be called before another to contest any matter respecting money collected under legal authority. This is unquestionable, when from the nature of the case, or from the circumstances attending it, the *money* can be drawn into litigation in the court from whence the process issued; but it does not apply to those cases where there can be no litigation of that nature. The investigation which may be had into the correctness of a sale, is not in any sense a contest with respect to the money or the right to it. Every court possesses the inherent power to prevent abuse of its own process, by setting aside fraudulent or even oppressive sales. [Moore v. Mobile Cotton Press, 9 Porter, 679.] But this does not divest the right of the defendant in execution to the excess of money arising from the sale of his property, after satisfying the process. The question may be undetermined, whether the sale is valid or invalid, yet the money is *prima facie* due to the defendant in execution, in the same manner as it is upon an express promise to pay; and this *prima facie* right is subject, in our opinion, to the process of garnishment. This is the effect of the decision in Day v. Becher, [1 McMullen, 92,] and also in Watson v. Todd, [5 Mass, 271;] in which latter the marshall of the United States was held liable to trustee process, for a balance remaining in hands after satisfying the process held by him against the goods of the common debtor.

There is a strong reason why the process should be effectual in a case like this, because the debtor may, at any time after the sale, demand and secure the money from the officer; and if it could not be attached, suitors would be entirely remediless.—On the other hand, no injury can arise to the officer, for it is in his power at all times, to pray the court before which the process of garnishment is returnable, to suspend its action until any question respecting the regularity of the sale, is determined. In the present case, no objection of this nature is interposed, and we must intend that no just cause for exception existed.

Our conclusion is, that the judgment is erroneous, and therefore, it is reversed and remanded.

LANGDON v. STEPHENS.

1. A widow is not dowable as a matter of right, of the entire dwelling-house, out-houses, &c. in which her husband usually dwelt, &c., but to such part thereof as corresponds with her dower interest in the lands. If the estate be solvent, and it will not be unjust to the heirs, she may insist on the entire dwelling-house, out houses, &c., as being assigned as part of her dower, in *lieu* of a corresponding portion of her dower in the lands, equal in value to the portion of the dwelling-house, of which she is not dowable as a matter of right.

ERROR to the Circuit Court of Perry.

Petition for dower by the defendant in error. From the facts agreed, it appears that the husband of the petitioner was seized of a house and lot in the town of Marion, in which he died.—That previous thereto he had executed a deed of mortgage on the property with a power of sale, but that the widow had not relinquished her dower therein. That after the death of the husband, the plaintiff in error purchased the property at the sale under the mortgage. That the estate is insolvent, and that a division of the premises, so as to give the widow one-third part thereof, including the dwelling house and out houses, would make the dower greatly more than one-third part of the value thereof, and leave the rest of but little or no value.

Thereupon, the court appointed five commissioners, who assigned to the widow one-third part of the lot by quantity, including the dwelling house, out-houses, &c.; which was confirmed by the court. From this judgment, this writ is now prosecuted.

The assignment of error is, the confirmation of the report of the commissioners.

A. GRAHAM, for plaintiff in error.
DAVIS, *contra.*

ORMOND, J.—This question depends upon the proper construction of the several acts on the subject. The act of 1812, [Clay's Dig. 172,] provides that the widow shall be endowed of

one-third part of the lands, tenements and hereditaments of which her husband died seized; "in which third part, shall be comprehended the dwelling house in which her husband shall have been accustomed most generally to dwell next before his death, together with the out-houses, offices, buildings, &c.: provided, that if it shall appear to the judge of the court to whom application is made, that the whole of said dwelling house, out-houses, &c., cannot be applied to the use of the widow without manifest injustice to the children or other heirs, then and in that case, such widow shall be entitled only to such part as the court may deem reasonable and just." A subsequent part of the act declares that the allotment of the dower shall be according to "quantity and quality."

At common law, the widow was endowed of the third part of the land and tenements of her husband; and was entitled to her dower in the capital messuage, unless it was a castle for the defence of the realm, and by a provision in *magna charta*, was entitled to remain forty days in the dwelling house, within which time dower was to be assigned her, which is called the widow's *quarantine*. [1 Coke Litt. 581, 32 b.] The statute of this State has materially changed the common law mode of procedure by which the widow is to obtain her dower, if not voluntarily assigned her by the heir; but it has not changed the common law as to the portion of which she shall be endowed, with the single exception, that the entire dwelling house, out-houses, &c., are to be included in her dower, if she desires it, and it can be done without prejudice to the heir. Was it intended that she should receive the entire mansion house in addition to her third part of the lands?—We are very clear, that such was not the intention of the Legislature. Taking the entire statute together, it is evident that the Legislature wished to guard against the inconvenience of the widow being entitled to a part of the dwelling house only; it was, therefore, declared, that the entire dwelling house, with its appurtenances should be included in her allotment of dower when that could be done without prejudice to the heir. But it by no means follows that she was to receive the house in addition to her third part of the land. Such a construction is repelled by the declaration that the widow shall be endowed of "one-third part of the lands, tenements and hereditaments," and especially by the clause which prohibits the entire mansion house from being

assigned to her when it will prejudice the heir. It might frequently happen, that the dwelling house, with its appurtenances, would constitute the whole of the real estate of any value. Such would be the fact, ordinarily, when the house was situate in a city or town, and such appears to be the fact here. In such a case, to assign to the widow as her dower the entire dwelling house, with its appurtenances, offices, garden, &c., would be in direct contravention of the statute. A construction which leads to such a result, must necessarily be wrong. The widow can, in no event, be entitled to more than one-half of the lands and tenements as dower. Yet, by this construction, she would virtually take the whole in cases like the present.

The controlling idea of the statute is the *quantity* of the dower interest. The provision, therefore, that the dwelling house, out houses, &c., shall be included in her dower interest, does not mean that this shall be in addition to her dower interest in the lands; as the statute of 1826 expressly declares that her dower interest in "*lands, tenements*," &c., shall be assigned to her according to "quality and quantity." If, therefore, she elects to take the entire dwelling house, in a case where she has the right to make such an election, there must be a corresponding abatement for the possessory value of that portion of the mansion to which she has not the absolute right of dower, made from the lands aasigned her.

It is, however, strenuously argued that although the widow has not an absolute right to dower in the entire dwelling against the "children or other heir" of the deceased, that no provision is made for a creditor. The unsoundness of this argument is demonstrated by the statute itself, which declares that where the estate is insolvent, the widow shall be endowed of one-third part only of the lands, &c., "any thing in this act to the contrary notwithstanding."

In addition, it is impossible to suppose that a reservation was made in favor of the heir, and not of the creditor, because until the debts are paid, the heir is entitled to nothing; and the result of the construction contended for would be, that as soon as the allotment of dower was made, the portion reserved for the heir would be liable to the payment of the debts of the ancestor.

The evident meaning of the proviso of the 1st section of the

act of 1812, which has created all the difficulty in this case, is, that where the estate is solvent, the widow may insist that the portion of the dwelling house, out-houses, &c., not given to her by law as her dower, shall be assigned to her as a part of her dower in lieu of a corresponding portion in value of her dower in the lands. Such being the proper construction of the statute, the court erred in ratifying the assignment of the commissioners of the entire dwelling house as dower, the estate being insolvent; and its judgment is, therefore, reversed, and the cause remanded for further proceedings.

PITTS v. BURROUGHS.

1. In an action for wrongfully and maliciously suing out an attachment against the plaintiff's estate, it is not allowable for him to prove, that *by common reputation in the neighborhood in which the defendant and himself resided*, it was supposed that he had gone to an adjacent State on a visit of business or pleasure.
2. What a party said upon leaving home, or immediately previous thereto, is *admissible* evidence in his favor as a part of the *res gestæ*, on the trial of an action for wrongfully and maliciously suing out an attachment against him in his absence.
3. The absence of a debtor from the State, does not subject his property to attachment upon the allegation, that he absconds or secretes himself; and his neglect to inform a creditor of his intended absence, does not, *per se*, authorise the latter to resort to that extraordinary remedy.

WRIT of error to the Circuit Court of Perry.

This was an action on the case by the plaintiff against the defendant, for wrongfully and maliciously suing out an attachment against him. The cause was tried on the plea of *not guilty*, and the jury returned a verdict for the defendant, on which judgment was rendered.

On the trial, the plaintiff excepted to the ruling of the court. It appears from the bill of exceptions, that the defendant having

shown the absence of the plaintiff from this State at the time when the attachment was sued out, the plaintiff offered to prove, by common reputation in the neighborhood in which both parties resided, that at and a short time before the attachment issued, the plaintiff had left the State on a visit to see his children in Mississippi. But the court excluded all evidence of common reputation, unless it was brought to the knov ledge of the defendant before he sued out his attachment. The plaintiff then offered to prove, that at and before leaving for Mississippi, he informed many of his neighbors of his intention to go there, and the object of his visit; and that he would return in a few weeks. But the court excluded this evidence.

The court charged the jury, that if they believed from the testimony that the plaintiff had left the State a short time previous to suing out the attachment, the defendant had probable cause for causing it to be issued; and unless the plaintiff could show that he informed the defendant before he left home of his intention to leave, he could not maintain this action.

A. Graham, (of Perry,) for the plaintiff in error, cited 1 Phil. Ev. 231–2; C. & H.'s Notes, 592; Ponsony v. Debaillon, et al. 6 Martin's Rep. N. S. 238; Greenl. Ev. 101, 108, 110, 113, 120; 5 Porter's Rep. 382; 2 Poth. on Ob., No. xvi. sec. xi.; 5 T. Rep. 512; 7 id. 509; 5 Litt. Rep. 5.

Tho. Chilton, for the defendant, insisted that the common reputation of the plaintiff's visit to Mississippi, and the object of it, was inadmissible; the cases cited by the plaintiff's counsel do not show that such evidence was ever admitted for such a purpose. His declarations, also, were properly excluded under the rule which inhibits a party from making testimony for himself.

The absence of the plaintiff from the State, was *prima facie* sufficient to show a probable cause for suing out the attachment; and the charge that the plaintiff should have informed the defendant of his intended absence, whether erroneous or not, conld not have prejudiced him. The defendant's counsel cited Middlebrook v. Ames, [5 Stewt. & P. Rep. 158.]

COLLIER, C. J.—It was not allowable to show, that at and previous to the time, the defendant caused his attachment to be

issued, common reputation in the neighborbood in which the parties resided, supposed that the plaintiff had gone to Mississippi to visit his children. If it was material to show where the plaintiff was, and the object of his absence, the fact could be shown by proof more precise and satisfactory than mere report or rumor. The cases in which common reputation is admissible, are exceptions to the ordinary rules of evidence, and usually rest upon the ground of necessity. Such proof is admitted to prevent a failure of justice, and when, from the nature of the inquiry, the fact cannot be established by evidence more certain and satisfactory. The present case does not come within any recognized exception.

What a party said contemporaneously with the doing of a particular act, may, in general, be proved as constituting a part of the *res gestae*, and necessary to characterize it. [Rex v. Smith, 5 Carr. & P. Rep. 201; Tompkins v. Saltmash, 14 Sergt. & R. Rep. 274; Boyden v. Moore, 11 Pick. Rep. 362; Hatton v. Banks, 1 N. & McC. Rep. 221.] In Ponsony v. Debaillon, et al. [6 Mart. Rep. N. S. 238,] the action was on a bond given upon suing out an attachment against an absconding debtor to indemnify the adverse party. The question was, whether the defendant was influenced by malice in causing his attachment to be issued; and it was held, that it was competent for the defendant to show he made inquiries after the plaintiff of third persons, and what were their answers as to his absence and the cause of it, without producing those persons to testify. It was said, in West v. Price's heirs, [2 J. J. Marsh. Rep. 380,] that "conversations or declarations made by the actor or party concerned, at the time an act is done, and which explain the *quo animo* and design of the performance, may, whenever the nature of the act is called in question, be given in evidence as part of the *res gestae*.—Without tolerating this explanation of the acts of men, by receiving their accompanying declarations, we should be often misled as to their true nature and character, and consequently liable to fall into errors in respect to them. The rule requiring *res gestae* declarations to be received as evidence, is a necessary and very useful one." [See, also, Doe ex dem. Haman v. Pettett, 5 Barnw. & Ald. Rep. 223; Downs v. Lyman, 3 N. Hamp. Rep. 486; 2 Phil. Ev. C. & H.'s notes, 592, and cases there cited; Greenl. Ev. 120-1-2.]

In the case before us, the thing done was the departure of the

plaintiff from his home; what he said upon leaving, or immediately previous thereto, as to the point of his destination, the object he had in view and when he expected to return, were explanatory of his intention; and in the absence of opposing proof, might repel the imputation that he was absconding or otherwise endeavoring to evade the service of ordinary process. These declarations, it is true, would not be conclusive upon the defendant; but it would be competent for him to prove that they were not just exponents of the *res gestae*. Other evidence would be admissible to show that his acts and intentions were different from what his statements indicated. The testimony on this point, it will follow, was improperly rejected.

The charge to the jury is clearly erroneous. It cannot be admitted that by leaving the State for a short time, a debtor subjects himself to the imputatien of absconding or secreting. Something more than mere absence is necessary to warrant such an inference. Contemporaneous acts, the demeanor of the debtor previous and subsequent to his departure, as well as what he said, are all admissible, at the instance of the creditor, to show that he had a probable cause for resorting to the remedy by attachment to collect his debt. The opposite conclusion, would make it necessary for one who is indebted to extinguish his liabilities before leaving the State, in order to protect his property from seizure; and this, although the object of his absence may be to obtain the means to pay his debts. And the same precaution would be proper whether his debts had matured or not; for an attachment will lie against an absconding debtor in either case.

The neglect of the debtor to inform the creditor of his intention to visit another State, cannot determine the object which induced him to go. He was not bound to impart such information, and the neglect to give it, does not authorize an inference prejudicial to his integrity.

It results from what has been said, that the judgment must be reversed, and the cause remanded.

VANCE v. WELLS & CO.

1. Where a *feme* is sued on a promissory note made by her when covert, and she pleads her coverture in bar, it is not a good replication that she promised to pay the note after her husband's death, unless some new consideration or previous moral obligation is shewn to support the promise.

WRIT of error to the Circuit Couut of Russell county.

Assumpsit by Wells & Co. against Mrs. Vance, on a promissory note. Plea, coverture. Replication, that since the death of the husband, the defendant promised to pay. The defendant demurred to this replication, but the court overruled the demurrer, and gave judgment for the plaintiff. This is now assigned as error.

S. HEYDENFELDT, for the plaintiff in error—cited 1 Strange, 94; 1 Shower, 183; 2 B. & A. 811; 8 Term, 545; 1 Bailey, 184; Ruger v. Lesporles, ex'r, 1 Dudley. 188; 1 Com. on Con. 162; Gould's Plead. 453, 567.

No counsel appeared for the defendant in error.

GOLDTHWAITE, J.—A married woman in general, cannot be a party to a promissory note or bill of exchange, so as to charge herself to liability in a court of law. [Chitty on Bills, 24.] Indeed, it has been held, that during coverture, she is not capable to contract, although separated from her husband. [Marshall v. Rutter, 8 Term, 545.] In the case of Lee v. Muggeridge, [5 Taunt. 37,] where a feme was under a moral obligation to pay a bond executed by her when covert, and she, after the death of her husband, promised to pay it, her executors were held liable on this subsequent promise. But here, there is no moral obligation shown, nor any new consideration to support the subsequent promise; and as the contract was wholly void by reason of coverture, the subsequent promise to pay, was without consideration, and cannot bind her.

Judgment reversed, and cause remanded.

MAYOR AND ALDERMEN OF MOBILE v. THE HEIRS OF FARMER.

1. The power given to the registers and receivers by the different acts of Congress, to determine between conflicting and interfering claims, and to direct the manner of locating and surveying them, applies only to confirmation of imperfect grants made by the former proprietors of the country. These officers have, therefore, no power to locate and direct the survey of a disputed line, where one of the parties claims by virtue of a complete and unconditional grant; as in the case of the donation to the corporation of Mobile of the hospital and bake-house lots, by the act of 26th May, 1824.

ERROR to the Circuit Court of Mobile.

Ejectment by the defendant in error against the plaintiff in error. The plaintiff below, to sustain his case, introduced in evidence a patent from the United States to the lessors of the plaintiff for certain land in the city of Mobile, and proved that the premises sued for were within the lines of the patent.

The plaintiff also read the deposition of James Magoffin and certain proceedings of the land office at St. Stephens in relation to the boundary of the lot known as the "Bake-house lot"; and other testimony proving the heirship of the parties, which need not be stated.

The defendant relied on the act of Congress of 26th May, 1824, "Entitled an act granting certain lots of ground to the corporation of the city of Mobile, and to certain individuals of said city"; and offered to prove that the lines of the Bake-house lot in the city of Mobile at the date of the act, comprised the *locus in quo*. The plaintiff objected to this evidence on the ground that the transcript of the record, attached to the evidence of James Magoffin, in which the limits of the Bake-house lot had been ascertained by him, was conclusive. The court sustained the objection, and excluded the evidence; and charged the jury that the heirs of Robert Farmer were entitled to the property described in their patent; that the corporation was entitled to the Bake-house lot; but that the decision of the officers of the land office at

St. Stephens, was conclusive of the question. To which the defendant excepted; and which he now assigns for error.

Campbell, for plaintiff in error. The title of the plaintiff in error arises under the act of 26th May, 1824, by which the "Bake-house lot" is vested in them. This act amounts to a complete grant, and any question arising upon it, is a judicial, and not a political one. What lands are included in the grant, is not a question for the land office, but the court. [6 Cr. 128; 8 id. 244, 9; 6 Peters, 741; 12 id. 454; 14 id. 414; 3 Dall. 456.]

The defendant's title is inferior. The patent bears date in 1837; the terms of renunciation are in *presenti*, and no evidence of title prior to 1824, is presented.

The register and receiver at St. Stephens were not authorized to settle conflicting rights. Their power is exhausted by the settlement of the question of location for the purposes of the land office. Whether that location is accurate, so far as third persons, who claim by a grant previous to the act of location are involved, is a question which can only be settled by the parties themselves, or by courts of justice. [Instructions and Opinions of the Land Office, Part 1, 455, § 5, 6; 6 Peters, 735.]

Phillips, for defendant in error. The title of the heirs of Farmer is derived from the act of 1822. Under that act, the certificate of the register and receiver was made and confirmed by Congress, and the plat of survey made; the title, therefore, is older than that of the plaintiff in error, which commenced in 1824.

The effort now, is to show that the north line, as fixed by the plat of survey confirmed by the act of 1822, was too far to the north. If the confirmed report, instead of being specifically located, had described it generally as the lot of Farmer's heirs, and in 1824, a donation to the plaintiff of the lot known, in Spanish times, as the "King's Bake-house lot," reserving the rights of others, under such circumstances, an inquiry, ordered by the common grantor, and his decision thereon as to the boundary, ought to be conclusive as a mere declaration of a fact which always existed. The more especially as the opposite party submitted to the jurisdiction, examined witnesses, and contested their rights.

ORMOND, J.—By the act of the 26th May, 1824, the United States granted to the mayor and aldermen of the city of Mobile, "all right and claim of the United States to the lots known as the hospital and bake-house lots, containing about three-fourths of an acre, in the city of Mobile." [1 Land Laws, 398.]

On the 14th November, 1837, a patent issued from the general land office in favor of the heirs of Robert Farmer upon a confirmation of a claim made by virtue of the act of 8th May, 1822, [1 Land Laws, 352,] which among other designated boundaries, calls for the "south boundary of the bake-house lot," as one of the boundary lines of the land conveyed by the patent; and the controversy in this case is, what is the south boundary of the bake-house lot. To establish this boundary, the plaintiffs rely upon a decision made by the register and receiver at St. Stephens, which they insisted, and the court below held, to be conclusive of the fact.

The right of these officers to determine this question, is attempted to be derived from the various acts of Congress giving them power to determine between conflicting and interfering claims, and, also, to direct the manner of locating and surveying the lands, the title to which had been confirmed. [See Land Laws, Part 1, 348, 352 and 455, and other acts to which these were supplementary.]

There can be no doubt that Congress may attach to a pure donation such terms as it pleases, and may invest the subordinate officers of the United States with power to determine questions of fact, and to ascertain and settle conflicting claims. Of this, the different pre-emption laws furnish examples. Whether it has such power in relation to the confirmation of imperfect titles derived from the former proprietors of the country, is a question which does not arise in this case.

The power conferred on the registers and receivers to decide upon conflicting claims, relates only to confirmations of imperfect titles derived from the French, British and Spanish governments; but the grant of the bake-house lot to the corporation of Mobile, was an unconditional donation of all the right and title of the United Stntes in and to the thing granted, which immediately passed to the grantee. The previous acts of Congress, therefore, giving to the registers and receivers power to ascertain and settle the boundaries of conflicting *confirmed* claims, have no ap-

plication; and it was not competent for Congress to attach such a condition to it subsequently, and it has made no such attempt. The description of the thing granted in the act, is sufficient to distinguish it from other lots in the city; and by the aid of extrinsic testimony, its boundaries may be ascertained. [Blake v. Doherty, 5 Wheaton, 359.]

By the treaty, the United States acquired all the title of the crown of Spain to these lots as public property. The question, then, is, what was the boundary of these lots in the Spanish times? This is a question of fact, and if a controversy should arise in relation thereto between the corporation and others claiming title to the adjoining lots, it can only be settled by those tribunals appointed by the constitution and the laws for that purpose, unless the parties interested should voluntarily submit to some other mode.

We are relieved in this case from the necessity of considering whether the recital in the patent of Farmer's heirs of the boundary line, would be conclusive, because the patent does not profess to locate the north boundary line other than by calling for the "south boundary of the bake-house lot." The precise location must, therefore, be ascertained by testimony showing where the south line was when in the occupancy of the crown of Spain. Such as its limits then were, it passed by the treaty to the United States; and with those limits, it was granted to the corporation.

It results from this examination, that the court erred in determining that the decision of the register was evidence of the boundary line of the bake-house lot; and its judgment is, therefore, reversed, and the cause remanded.

HALL v. THE SELMA AND TENNESSEE RAIL ROAD COMPANY.

1. The opinion of one of the commissioners appointed by an act of incorporation to receive subscriptions for stock, that a subscriber might forfeit his stock by failing to pay an assessmant thereon, can have no influence upon the liability of the lat-

ter; and in an action brought for the recovery of an assessment is irrelevant testimony.

2. In an action against a stockholder for his subscription, he cannot object that the directors of the company had released other stockholders; if the release was under a power it would be valid, if otherwise merely void.

3. Where the charter of a company appoints commissioners and directs books of subscription to be opened at certain places, but also directs that upon default of payment of stockholders, their stock shall be sold, and books opened to supply the deficiency; a subscriber under this latter provision cannot object to pay for his stock, because he subsbribed for the same at a place where the books were not required to be originally opened.

4. Where an act of incorporation requires five *per cent.* upon stock to be paid at the time of subscription, if the subscriber does not then pay it, but a judgment is afterwards rendered against him therefor, which he satisfies, he cannot object to a suit brought for other assessments, that he did not pay the five *per cent.* in cash when he subsribed.

WRIT of error to the Circuit Court of Dallas.

This was an action of assumpsit by the defendant in error against the plaintiff, to recover the sum of one hundred dollars, with interest, being the amount of two instalments of five per cent. each, upon one thousand dollars of the stock of the company previously subscribed for.

The cause was tried upon issues to the pleas of *non-assumpsit, nul tiel* corporation, fraud, &c. A verdict was returned for the plaintiff for the sum claimed, and a judgment was rendered accordingly. On the trial, the defendant excepted to the ruling of the court. From the bill of exceptions, it appears that the defendant offered to prove by Hugh Ferguson, one of the commissioners appointed by the act incorporating the company, to open books for subscriptions for stock; that he, the witness, had expressed the opinion very frequently, in the community, with a view to obtain subscribers, that a stockholder could relinquish his stock by failing to pay an assessment thereon for ninety days. There was no attempt to show that the defendant was aware of the witness' opinion, and the court excluded his evidence.

The defendant proposed to prove by the testimony of the same witness, who was also the secretary of the company, and by the books of the company, that the directors of the corporation, by resolution passed before the institution of this suit, had given to the large stockholders the right to relinquish some of their stock,

of which some of them had availed themselves; but that right had been denied to those who owned no more stock than the defendant. This evidence was also excluded, the court believing the resolution of the directors to be unauthorised and void.

It was then shown that the commissioners had opened books of subscription, stock had been subscribed for, the company had organized by electing a board of directors, and made some contracts for doing work on the road; and more than five per cent. on the subscriptions had been paid. But the entire capital stock had not been sold. The defendant subscribed for ten shares of stock at Burnsville, in Dallas, on the 17th March, 1837, in the same subscription book that was used at Selma, and was then in the possession of one of the commissioners who was then at Burnsville, for the purpose of receiving subscriptions under an authority from the Directors.

The defendant did not pay five per cent. upon the shares subscribed for, at the time of his subscription; but he had since paid it in satisfaction of a judgment that had been rendered against him, upon a suit brought for its recovery—whether that suit had been defended or not, the evidence did not show.

Upon this evidence, the court charged the jury, that if the defendant did not pay five per cent. upon the shares taken by him, simultaneously with his subscription, and had done no act that recognized him as a corporator, the plaintiff could not recover.—But if he had since paid that amunt voluntarily, or after judgment, he would be estopped from denying that he was a corporator. *Further*, the directors had no right to direct books of subscription to be opened at Burnsville or elsewhere; unless after a sale of delinquent stockholders shares, to supply a deficiency occasioned by such sale; and if the defendant subscribed for stock when the books were opened by the authority of the directors, under any other circumstances, his subscription would not be binding upon him. But if the defendant afterwards paid the five per cent. voluntarily, or after suit brought, and the plaintiff had assented to, or accepted the subscription, it wonld then be binding on the defendant.

G. W. Gayle, for the plaintiff in error insisted upon each of the points raised upon the bill of exceptions, as showing that the law of the case had not been correctly determined by the circuit

court. He cited the act of incorporation of 1837, § 17, 20; 2 Stew't Rep. 38; 9 Porter's Rep. 633; 8 Serg't & Rawle's Rep. 219; 13 id. 256; 1 Caine's Rep. 391; Dissenting op. of Lewis, J.

C. G. Edwards, for the defendant, was stopped by the court upon the points arising on the rejection of the evidence. He denied that the defendant conld urge the non-payment of five per cent. at the time of his subscription; the more especially as the company had organized before he subscribed. But if the cash payment was an indispensable condition to the validity of the subscription, the subsequent payment, whether voluntary or not, confirms the contract for stock between the plaintiff and defendant, and obliges the defendant to pay for it *in toto.* [See the Selma and Tennessee R. R. Co. v. Tipton, 5 Ala. Rep. and cases there cited.]

COLLIER, C. J.—In respect to the declaration by one of the commissioners, that it would be allowable for the subscribers to forfeit their stock, by failing to pay an assessment thereon, no matter for what purpose made, can have no influence in determining the validity of the defendant's contract with the company.—The opinion of one of the commissioners upon a question of law, would not be authoritative, or in any manner affect the rights and liabilities of the corporation, or either of its members. And it would, therefore, be unimportant, whether it was communicated to the defendant previous to his subscribing.

If the directors of the company, either with or without authority, released the larger stockholders from the payment of a part of their stock, such an act cannot discharge the defendant from the payment of his stock, either in whole or in part. If such a release was made in virtue of a legal power, it could not be objected to, and if without authority, it would be merely void.

The second section of the charter directs, that books shall be opened at Selma under the superintendence of the commissioners, or a majority of them, and so continue, until the entire amount of the stock authorised to be sold, shall be subscribed. By the seventeenth section, it is provided, that upon a forfeiture of stock for a failure to pay an instalment required thereon, a new subscription may be opened to make up such deficiency as may be caused by the default: *Provided,* that the president and directors may offer for sale the stock of any defaulting stockholder, or so much there-

of as may be necessary to pay his defalcation, after giving twenty days notice of the time and place of sale, and out of the proceeds, first pay what is due to the company, and the residue, if any, shall be paid to the defaulting stockholder. Under this section, we think the directors in obtaining subscriptions, were not restricted to Selma, but might have received subscriptions elsewhere. And even if the act contemplated Selma as the only place at which stock should be subscribed, is it by any means certain, that it should not thus far be considered as directory, so as to prevent one who had become a corporator, from avoiding the payment for stock, by showing that his subscription was made at some other place? As it is unnecessary in the present case, we decline examining this question.

In Tipton v. The Selma and Tennessee R. R. Co. [5 Ala. Rep.] we said "not only estoppels technically so called, but estoppels *in pais*, operate both for and against corporations; and it may be laid down generally, that a party may be concluded from denying his own acts or admissions, which were expressly designed to influence the conduct of another, and did so influence it; and when such denial will operate to the injury of the latter." It was also held that the participation of Tipton "in the organization of the company, his assent to treat it as a corporation, as indicated thereby, and still more strongly by his note given for the five per cent. and the acceptance of a place in the directory, all seem to show that he regarded the plaintiff as a corporation, liable to all burthens and entitled to all privileges which the charter provided." In that case, the subscription was made previous to the organization of the company which the statute contemplated. Here the organization was complete, and the corporation had moved in the execution of the purpose for which it was created, so that there is no objection to the competency of the plaintiff to contract and coerce a compliance by suit.

Without pretending to express a decisive opinion, we would remark, that we cannot very well perceive a difference in principle, between a payment of the five per cent. made voluntarily at a time subsequent to the subscription, and a payment under legal coercion after defence made. In the former case, the subscriber for stock cannot set up his own neglect to pay with promptness, the sum directed by the charter to be paid in cash; because, if indispensable to entitle him to the subscription, the sub-

sequent payment and acceptance, will give to the contract validity, as between the company and the stockholder. And in the latter case, the fair intendment must be, either that the law was in favor of the company, or the defendant acquiesced in the judgment; in either event, the payment would be made, and the subscriber entitled to the stock upon meeting such farther requisitions as might be made on him. Under such circumstances would it not be incumbent on him to repudiate the contract if its performance was not obligatory, without awaiting not only a call, but a suit for further instalments?

In the present case, we think that as the payment was made upon a judgment recovered in a suit, to which no resistance was made, the defendant must be taken to have conceded his liability; and to have voluntarily paid the five per cent. We have not thought it necessary to inquire, whether where subscriptions were made after the organization of the company, or to supply deficiencies of defaulting stockholders, the charter requires a payment to be made at the time of subscribing; or whether in any case, a compliance with that requisition is indispensable to the contract. These are questions with others hinted at, but not decided, which we purposely waive.

The consequence is, that the judgment of the circuit court is affirmed.

NESBIT v. BRADFORD.

1. A guaranty in these words, "I bind myself to pay this note if T. M. L. (the maker) does not," made upon the back of the bill by one who is not a party to it, is not within the statute defining the liability of indorsers; and the diligence required of the holder is to sue the maker to the first court subsequent to the guaranty: but this is unnecessary when the maker is unable to pay by reason of insolvency, and in such event an action on the guaranty will lie without any suit against the maker.
2. The *prima facie* intendment of such a guaranty, considered in connexion with the single bill is, that the contract was made with the payee.

3. Such a guaranty is a promise in writing, and as such, imparts a consideration, until it is shown to have none.
4. In a declaration on such a guaranty it is only necessary to set out the single bill with respect to which it was made, the guaranty, according to its terms or according to its legal effect, the facts from which diligence is to be inferred, or the insolvency which renders diligence unnecessary, and a sufficient breach of the contract.
5. The omission to fill up a blank in the declaration, with a day of the month and year, when the precise date is immaterial, cannot be taken advantage of by general demurrer.

WRIT of error to the Circuit Court of De Kalb county.

Assumpsit by Nesbit. The declaration contains four special counts, which were demurred to, besides a common count on an account stated, upon which issue was taken.

The first count alleges, that one Likens, on the 21st February, 1837, executed to the plaintiff a certain writing obligatory, whereby he promised on or before the 1st day of January, 1839, to pay the plaintiff 320 dollars. That, therefore, on the 10th January, 1839, the defendant, at his own special instance and request, made and signed an endorsement on the back of said writing obligatory, in these terms: "I bind myself to pay this note, if T. M. Likens does not"; meaning and intending, by said indorsement, to guarantee the payment of the sum of money, specified in the writing obligatory, to the plaintiff, in the event that the said Likens should fail to pay the same. Then follows an averment of a demand of Likens, his refusal to pay, and that he is unable by reason of total insolvency to pay; together with an allegation of notice of these facts to the defendant.

The second and third counts are upon a promise by the defendant to pay the debt due from Likens in consideration that the plaintiff would give him day until the —— day of ——, 1839; and the averment in both counts is, that the plaintiff did forbear and give day to said Likens until the —— day of ——, 1839. They contain an averment of demand of payment of Likens after the expiration of this time, his refusal and inability to pay by reason of total insolvency, and of notice to the defendant of these facts.

The fifth count merely sets out the execution of the writing obligatory by Likens to the plaintiff, its subsequent indorsement by the defendant in the terms of the writing itself; the non-pay-

ment by Likens of the sum of money specified in the writing obligatory; and his inability to pay the same at any time subsequent to the date of the indorsement by the defendant, by reason of insolvency. "By means whereof the said defendant became liable to pay to the said plaintiff the sum of money therein specified when he should be thereunto afterwards requested."

The defendant demurred to these four counts severally, and the court sustained the demurrers.

In order to prove the issue formed on the fourth count, which was that for an account stated, the plaintiff, after having proved the respective signatures of Likens and Bradford, offered the wriing obligatory and indorsement thereon being the same described in the first and last special counts, but they were rejected by the court; whereupon the plaintiff excepted.

The plaintiff now assigns the judgments on the demurrers and the exclusion of the evidence offered by him, as error.

T A. Walker, with whom was Mr. Rice, for the plaintiff in error, cited Click v. McAfee, 7 Porter 62; Adams v. McMillan, 8 Porter, 445; Gause v. Hughes, 9 Porter, 552, 564; Estel v. Shelly, 2 Porter, 185.

S. Parsons *contra*, argued that the difficulty, upon the first count, is, to distinguish this from the case of Click v. McAfee, [7 Porter, 62.] But there is a distinction, because here the person is not named to whom the guaranty is made. It should have been averred to whom the guaranty was made. [Walton. v. Dodson, 3 Car. & P. 162; 13 Mass. 161; 6 Wend. 644.]

The second and third counts are bad, because no time was shown to which day was given; to leave the declaration blank is insufficient. [1 Chitty Plead. 256.]

GOLDTHWAITE, J.—1. The sufficiency of the several special counts of this declaration will be best examined after ascertaining the legal effect of the indorsement made by the defendant in the writing obligatory of Likens, but which is set out in *haec verba* in one or more of the special counts. In Granniss & Co. v. Miller, [1 Ala. Rep. N. S. 471,] we held that the words, "I assign and guaranty the payment of this note, waiving demand and notice," was not an absolute and uncondi-

tional promise to pay the amount of the note presently; also, that it was not necessary, for the purpose of establishing the guarantor's liability, to show a suit prosecuted against the maker in the mode directed by the statute defining the liability of indorsers of notes not payable in bank. We then considered that the legal effect of such a contract was a promise to pay whenever the maker was ascertained to be unable to do so. The guaranty in the present case, in terms, is not materially different from the one in the case just cited. There, however, the plaintiffs derived their title to the note through the indorsement; but in this case, the defendant never was the holder of the note. In Jordan v. Garnett, [3 Ala. Rep. 610,] we held that an indorsement made by a person upon a note to which he was not a party, either as payee or assignee, was not within the statute previously adverted to, but that its legal effect was to impose on the indorser a liability in the event that the amount due could not be collected from the maker by the use of proper diligence; and that suit against the maker to the first court must be brought unless excused by the insolvency of the maker. In Milton v. De Yampert, [3 Ala. Rep. 648,] the indorsement was also made by a person not a party to the note, but it was indorsed previous to its maturity, and was payable in bank. We then held the indorsor to be charged after demand and notice in the ordinary mode. We also came to the conclusion that, "Whenever the security, upon which the imperfect indorsemet is written, may be the subject, either of assignment or indorsement, the imperfect indorsement must be governed by similar rules to those which are applicable to perfect indorsements; and a similar degree of dilligence is necessary to charge one who becomes bound by an imperfect indorsement as is necessary to charge an actual indorser." These cases will enable us, without difficulty, to determine that Bradford's undertaking is not within the statute defining the liability of indorsers; and the dilligence imposed on the holder of the note was, to sue the maker at the first court, if solvent. But they also establish, that such a suit is unnecessary whenever the maker is unable to pay by reason of insolvency.

2. It is said, however, that this indorsement does not specify the person who is contracted with, and that, as the contract itself is not negotiable, a direct averment is necessary to show it to have been made with the plaintiff. However the law may be

with respect to the negotiability of such an engagement as this, we think the *prima facie* intendment, when the indorsement is considered in connexion with the bill single, is, that the promise was made to the payee.

3. Another objection has been urged, that this is not of that class of writings which import a consideration; and, therefore, it is insisted, a consideration must be shown in the declaration, inasmuch as the promise is to pay the debt of another. The decision in Click v. McAfee, [7 Porter 62,] is a full answer to this objection in all its aspects.

We are warranted, then, in stating the legal effect and *prima facie* intendment of this indorsement by Bradford to be a promise to the plaintiff to pay him the amount of the writing obligatory previously executed by Likens, in the event that he should prove unable to pay after using due dilligence to collect it from him in the first instance, or in the other event of his inability to pay by reason of insolvency.

4. All, then, which is necessary to be stated in a count upon this guaranty, is, that the writing obligatory was made by Likens setting that out according to its terms; that the guaranty was made according to its terms, or according to its legal effect; the failure by Likens to pay; and the facts from which due dilligence is to be inferred, or his insolvency, which renders any dilligence unnecessary. These, with a sufficient breach, it is believed, would constitute a sufficient declaration, as proof of the same facts would authorize a recovery. [Adams v. McMillan, 8 Port. 445.] The first and last counts contain all these allegations and averments; and, therefore, we consider them as substantially good, though both are somewhat inartificially worded.

5. The other two special counts are, in form and substance, counts upon a promise to pay the note in consideration of forbearance; and no other objection is taken against them than the omission to insert the precise day to which forbearance was agreed to be given. If a day certain was inserted wherever the blank space occurs, it would be competent for the plaintiff to prove a day different from the allegation. Such a defect is matter of form, and not of substance, and cannot now be reached by demurrer. [Estill v. Shelly, 2 Porter, 185.]

It is unnecessary to swell this opinion by considering the question raised by the bill of exceptions; as what has already been

said, is sufficient to show the error in sustaining the demurrers, and to govern the subsequent action in the suit.

Judgment reversed, and remanded.

ARMSTRONG, USE, &c. v. ADAMS.

1. A suit was instituted by A. for the use of L. & L., partners, and judgment rendered for the defendant. A. and one of the beneficial plaintiffs died, and the surviving partner took the benefit of the bankrupt law, after which a writ of error was prosecuted upon the judgment to this court. *Held*, that the writ of error must be dismissed, and could not be amended under the statute authorizing the amendment of writs of error.

ERROR to the Circuit Court of Dallas.

Motion to dismiss the writ of error.

R. SAFFOLD and J. B. CLARKE, for the defendant in error.
EDWARDS, *contra*.

ORMOND, J.—The affidavit on which this motion is founded, and which is not controverted, states that Armstrong, the nominal plaintiff, and Lea, one of the beneficiaries of the suit, had departed this life, before this writ was prosecuted—That Langdon, the other beneficiary, had obtained a certificate and final discharge as a bankrupt, under the act of Congress; also, before the suing out of the writ of error. For the motion it is insisted, that the act which declares that suits brought for the use of another, shall not abate by the death of the nominal plaintiff, but shall continue for the benefit of him for whose use it was instituted, vested in Langdon, the survivor, upon the death of the nominal plaintiff, the legal title, and that all his right, title and interest, was by the operation of the bankrupt law, vested in the assignee in bankruptcy, by whom alone this writ could be prosecuted.

The plaintiffs' counsel maintains that the legal title continues in the nominal plaintiff, and that the suit may be revived in the name of his legal representative, but if that is not the law, and the writ must be prosecuted in the name of the assignee in bankruptcy, then he moves to amend the writ of error under the act of 1843. [Clay's Dig. 312, § 39.]

We do not think it proper at this time to determine the question, whether under the circumstances of this case the writ of error must be prosecuted by the representatives of Armstrong, or the assignee in bankruptcy, because, in either event, the writ must be dismissed, unless it can be amended under the statute referred to. The authority conferred by that statute on this court, is to amend writs of error, "where there shall be any variance from the original record, either in the name or number of the parties, the form of the action or other defect, and make them agreeable to the record." To authorise an amendment of the writ under this statute, the record must furnish the means of doing it, and although we shall be disposed to give this statute a most liberal construction to effectuate its intent, we are clear, it does not reach such a case as this. Armstrong was dead when the writ was sued out, and the interest of Langdon was divested out of him, and vested in another, by operation of law. There was, therefore, clearly no authority to sue out the writ in their names, and the record affords no aid whatever, in ascertaining who are the proper parties. The case is the same in effect, as if the writ had been sued out in the name of a stranger to the record, which it is clear would not be aided by the statute. We are, therefore, of opinion that the writ of error must be dismissed.

PAUL v. MEEK.

1. The act of 1819, makes the "borrower or party" to a usurious contract, a competent witness to prove the usury; but this statute cannot be so construed, as to authorise the indorser or surety of the "borrower or party," when sued, to be a witness to prove the fact, so as to defeat a recovery against him.
2. "The borrower or party" being competent to prove the transaction illegal for usury, the *particular facts* to which he may testify, cannot be defined with precision, but must depend, to a great extent, upon the case itself.
3. It is allowable for a judge to charge the jury, that if they believe the testimony adduced, they should find a verdict for one of the parties, (designating which): such a charge does not assume the decision of the facts.

WRIT of error to the County Court of Tuskaloosa.

This was an action of assumpsit by the plaintiff in error against the defendant, as the indorser of a bill of exchange for nine hundred and twenty-eight dollars, of which he was the payee, and John Meek, both drawer and acceptor. The cause was tried on the plea of *non-assumpsit.* On the trial, the plaintiff excepted to the ruling and instructions of the court. It appears that the plaintiff introduced the bill and protest, which recited that the defendant had been duly notified of its dishonor—and also, proved that the plaintiff's residence was the city of Tuskaloosa.—The defendant then offered himself as a witness, to prove that the bill was founded upon a usurious consideration; the plaintiff objected to his competency, but the objection was overruled, and the defendant permitted to give evidence. Thereupon, the defendant stated that the bill in question was given by John Meek, upon a settlement of large monied transactions had between the drawer and the plaintiff; that the drawer had also bought a piece of land of the plaintiff, and when the purchase became due, the time of payment was extended, and in consideration thereof, the drawer ageed to pay thirteen *per centum, per annum,* interest. Upon the settlement, the drawer transferred to the plaintiff a house and lot, and delivered him the bill, and the plaintiff at the same time admitted that the drawer had paid him a sum of money amounting to more than the principal and legal interest, lent and

advanced by him to the drawer. In fact, the plaintiff admitted that the bill was given for usury entirely.

The plaintiff then moved to exclude this evidence, which motion was overruled by the court; he then moved the court to exclude all the defendant's testimony, except so much as established the fact of usury; this motion was also denied. No further evidence was offered by either party.

The court charged the jury, that if they believed the testimony of the defendant, they must find a verdict in his favor. The questions of law arising upon this charge, as well as the several decisions recited, are duly reserved for the decision of this court.

Crabb, for the plaintiff in error, made the following points: 1. Before the defendant was allowed to give evidence, he should have submitted to the plaintiff a written statement of what he proposed to narrate, that the plaintiff might by denying its truth, as the statute directs, have excluded it. 2. The defendant was incompetent to testify in his own favor, because he does not appear to have been the borrower of the money, or the party from whom a higher rate than legal interest was taken. 3. If the defendant was competent, it was merely to prove the *fact* of usury; and the county court should have excluded his evidence as to other facts. 4. The charge of the court assumed as a legal conclusion, what was proved, instead of referring it to the jury to determine.

Peck & Clark, for the defendant—insisted, that the first point was not presented by the bill of exceptions: the only question as it respected the defendant's testimony, was, whether he was a competent witness. The statute is not to have the restricted construction supposed; it embraced within its provisions, not only the borrower, or the person stipulating for the payment of usury, but the surety or indorser of such person also. If part of the defendant's testimony was inadmissible, the objection to it should not have been made *en masse*, but it should have particularly pointed out so much as was exceptionable; this not having been done, the court properly overruled the motion *in toto*. The charge of the court refers to the jury the credibility of the testimony, and informs them if they believe it, they should find for the defendant; there is nothing irregular in this.

COLLIER, C. J.—1. The first point made by the plaintiff's counsel, is not psesented by the record. The objection to the defendant's testimony does not appear to have been, that the plaintiff had not been furnished with a written statement of the facts which he proposed to narrate; but it was to his competency generally.

2. The fourth section of the act of 1819, to regulate the rate of interest, declares, that any note or bond given on account of any usurious contract, shall be void; and that "the obligor or obligors," are made "competent witnesses to prove the usurious consideration of any such bond or bonds, note or notes." By the fifth section of the same statute, it is enacted that, "when any suit or action may be brought in any court of record in this State, touching or concerning any usurious bond, specialty, promise or agreement, the borrower or party to such usurious bond, specialty contract, promise, or agreement, from whom such higher rate of interest is, or shall be taken, shall be a good and sufficient witness to give evidence of such offence." [Clay's Dig. 590.]

The admission of a party to a suit, or of one who is directly interested in its determination, to give evidence in his own favor, is at variance with the common law; and a statute which introduces such a rule, should not be extended by construction beyond what was obviously intended by the legislature. Here it is said that "the borrower, or party to such usurious bond, &c. from whom such higher rate of interest is or shall be taken," shall be a witness, &c. It is clear that none other than he who is a party to the transaction by which usury is taken or reserved, is made competent to prove the fact. If a contract would only be usurious in the case of a direct loan of money, or other thing, then the term "borrower," would have been sufficiently expressive of the meaning of the legislature; but the statute is one of very extensive operation, and applies to all contracts, agreements, &c. by which a higher rate of interest than the law prescribes, is reserved. Hence it was thought necessary, in order to make the law harmonious and consistent in its provisions, and express with clearness, the legislative will, to declare, not only that one who was in ordinary parlance a *borrower*, but also a *party* from whom a usurious rate of interest should be reserved, was competent to prove the fact by his own evidence. This provision in the statute was intended to discountenance usury, and to afford a facility

in proving it without a resort to equity to obtain a discovery, where other proof was not attainable. The reason of the enactment does not apply where the borrower, or party to the unlawful transaction is not sued; for if a surety, indorser, or other person in privity with the original party, is the defendant, the original party is competent, and may be examined as a witness to prove the usury. But it is needless to reason upon this point—the terms of the act are too explicit to require illustration.

3. It is unnecessary to consider the extent to which the "borrower or party, &c." may be permitted to give evidence under the act in question; but we would remark that he is only made competent to testify to the illegality of the transaction for usury. What particular facts constitute the offence, must depend more or less upon the case itself, and cannot be well defined within limits of general application.

4. It is entirely competent for a judge to instruct the jury, that if they believe the testimony adduced, they should find a verdict for the one party or the other. Such a charge does not trench upon the appropriate office of a jury. It does not assume the truth of the evidence; that is an inquiry expressly referred to their determination, and the court only declares what is the law upon a supposed state of facts. This is what is done upon a demurrer to evidence, and cannot operate more prejudicially to the plaintiff, than if the defendant had demurred.

As the evidence of the defendant in the present case was inadmissible, it is unnecessary to consider its effect, upon the hypothesis that it was regularly before the jury. The judgment must be reversed, and the cause remanded.

WINSTON v. METCALF.

1. P. and W. are the joint makers of a note to one J. W, who assigns it to M., but previous to any notice to the payees of the assignment, P. one of them acquired a note made by J. W., payable to one J. P., and by him assigned to P. *Held*, in a suit on the note by M. against W., that the latter was entitled to

the benefit of the set-off held by his co-maker P. against J. W., on prodecing the note at the trial, with the consent of P., to use it as a set-off.

2. An agreement, contained in the body of a note, purporting to be in consideration of the hire of slaves, to return the slaves clothed as slaves usually are, is not assigned by the indorsement of the note, nor can the assignee maintain an action for the breach of it, when suing for the money due on the note.

WRIT of error to the County Court of Sumter.

Assumpsit by Metcalf, as the indorsee of a promissory note, described in the declaration as made by Winston, for the payment of 200 dollars, to one Waller, on the 1st January, 1842, for the hire of two slaves, which were to be returned clothed as slaves usually are. The breach assigned is, the non-payment of the money, and the not returning the slaves clothed in the usual manner. The defendant, in addition to the general issue, with notice of set-off, pleaded a special plea to this effect:—That the note was made by one Pettus and the defendant, the latter being a mere security; that Pettus, previous to the assignment of the note sued on by Waller to the plaintiff, had become the owner of the note made by the former to one Pierce for 125 50-100 dollars, due the 1st day of January, 1841; which note was assigned by the said Pierce to Pettus before any notice of the assignment of the note due to Waller. That the same was purchased as and for an off-set to the note sued on, and for the just account and benefit of the defendant and the said Pettus; and that the defendant, with the concurrence and consent of Pettus, produces the said note so assigned, and offers to set-off the same to part of the demand sued for. The court sustained a demurrer to this plea; and at the trial, the same facts, in substance, were proved before the jury; and, also, that the defendant had no other interest in the note than as an off-set to this suit, and never had it in his possession, though it was produced in court and offered as a set-off.

The court rejected the set-off; and this is now assigned as error, as is, also, the overruling of the demurrer to the plea.

BLISS & BALDWIN, for the plaintiff in error, cited Minor, 321; 1 Ala. Rep. N. S. 93; Bab. on Set-off, 22; 8 N. H. 539; 4 ib. 236; 3 Mon. 19; 4 ib. 1; 4 John. C. Rep. 15; 13 Johns. 9; 3 Mason, 145.

METCALF, *contra*, insisted, that Winston had no interest in the note offered as a set-off. [2 Ala. Rep. 675.] Besides the general objection to the set-off as not being a debt between the same parties, a part of the demand sued for is unliquidated damages, to which there can be no set-off. [Williams v. Love, 2 Ala. Rep. 71; Chitty on Con. 658.]

A surety cannot set-off a debt due to the principal. [Lyon v. State Bank, 1 Stewart, 442; Holmes v. Bullock, 4 Ala. Rep. 228; Clay's Digest, 382; Minor, 321.]

GOLDTHWAITE, J.—1. The validity of the set-off, produced at the trial, depends upon the construction of the statute of set-off in connexion with other enactments supposed to bear on it. So much of that statute as affects the question now raised, is in these words: "In all cases where there are, or shall be mutual debts subsisting between the plaintiff and the defendant, or if either party sue or be sued as executor or administrator, where there are mutual debts subsisting between the testator and the other party, one debt may be set-off against the other." Clay's Digest, 338, § 161.] This statute was enacted in 1807, at which time the enactment making joint obligations, &c., joint and several, had not been passed; nor was our present statute, securing the right of the maker of a note to set-off, against the assignee, any demand possessed against the note previous to notice of the assignment, then in force. At that time, all promissory notes were assignable in the same manner as inland bills of exchange. [Laws of Ala. 67 §1.] It is obvious, therefore, when these statutes alone are regarded, the question now presented could not arise: first, because a *bona fide* assignee took the note discharged of all equities; and, second, because the plaintiff was then constrained to sue all the makers of the note jointly.

The first change of law connected with this subject, was made in 1812, when the general negotiability of promissory notes was restrained, and a condition imposed upon their transfer. This condition is, "that the defendant shall be allowed the benefit of all payments, discounts and sets-off made, had or possessed against the note sued on previous to the notice of the assignment, in the same manner as if the same had been sued and prosecuted by the payee." [Clay's Digest, 381, § 6.]

It is clear, with reference to this latter statute, if the suit had

been brought against both principal and surety, that the note offered as a set-off, must have prevailed; for the case then would be precisely the same as Pitcher v. Patrick, [Minor, 321,] where a debt due to the obligee, from one of two obligors, was allowed as a set-off to an action by the administrator of the obligee against both obligors. To the same effect is Carson v. Barnes, [1 Ala. Rep. N. S. 93.] Both these decisions were doubtless influenced by another enactment passed in 1818, which declared the effect of all joint obligations to be joint and several, and permitted the plaintiff to proceed against one or more of the joint obligors, &c. [Clay's Digest, 323, § 61.] It is this statute which warrants the plaintiff in this suit in proceeding against Winston alone; and it is insisted, the effect of it is to prevent the introduction of any set-off exclusively owned by the other maker of the note, inasmuch as the debts, in this condition of the case, cannot be said to be mutual. The strongest point of view in which this question can be considered on the part of the plaintiff is, that the character of joint and several obligations is not so completely changed as to abolish the consequences which arise from the death of one of the makers; in which event a complete legal remedy only remains as against the survivors; or rather, there is not an unrestricted right to proceed against the personal representative of the deceased maker. This point received some consideration in the case of Von Pheel v. Connelly, [9 Porter, 452.] There, the action was by the assignees of a note payable by two persons; to this action the defendants pleaded a set-off due by *open* account from a firm, of which the payee of the note was a partner, and this was held not to be a mutual debt within the meaning of the statute. The precise difference between that case and this, on the principle we are now considering, is that no several suit could have been brought against the persons owing the account, inasmuch as demands of that description are not made joint and several by the statute. It is perhaps impossible to say that this feature of joint obligations, remaining unchanged, may not have its effect in some cases, but what this effect is, it is improper to speculate upon in advance.

Indepenent of any consideration whether this is a mutual debt within the terms of the general statute of set-off, we think it is within the precise words of the restriction imposed on the assignment of promissory notes. When the plaintiff acquired his

interest in the note sued on, it was affected with the right of the principal debtor to set-off the note then held by him against the payee; and it seems to us that this right can be in no wise impaired by any act of the plaintiff. True, he is entitled to sue either party severally, but it by no means follows, that when he does so, that he avoids any defence which could be interposed if the suit was brought against the principal debtor. Any other construction of these statutes will lead to the great injustice of allowing a party, by selecting one out of several persons equally responsible to him, to avoid the just operatien of the law.

The principal debtor is liable to indemnify his surety whenever the latter pays the debt; and when the former has procured a valid set-off, we perceive no sound reason why the surety should not be permitted, with his consent and concurrence, to enforce it in the same manner as if the suit was against both jointly.

The case of Lyon v. The State Bank, [1 Stewart, 442,] does not assert a principle different from that now held; for there, no assent of the principal debtor was shown that the money due to him from the bank, and held in deposite, should be applied in discharge, or as a set-off of the debt. We are not to be understood as disturbing those decisions, where we have held that a set-off must be such a legal debt as will entitle the party offering it to maintain a cross action. [Crawford v. Simonton, 7 Porter 110; French v. Garner, ib. 549; Bell v. Horton, 1 Ala. Rep. N. S. 412; Adams v. McGrew, 2 Ala. Rep. 675; Holmes v. Bullock, 4 ib. 228.]

2. It is also urged, as a reason why this set-off ought not to be allowed, that the action, in part, is brought to recover unliquidated damages, supposed to accrue from the omission of the makers of the note to return the slaves clothed in the usual manner. We apprehend, however, that no right to recover damages, on this account, passed to the assignee, inasmuch as their engagement, in this respect, is neither a promise to pay *money or any other thing*, and, therefore, is not assignable within the statute. In Virginia it has been held, under a statute very similar to our own, that bonds, &c., with a collateral condition, are not assignable. [Henderson v. Hepburn, 2 Call. 232; Lewis v. Harwood, 6 Cranch, 83.] Our statute, it will be seen, excludes the idea that such an agreement is assignable; and the only legal effect which can be given to the assignment of the note sued on, is to consider

it as investing the assignee with the right to sue in his own name for the money promised to be paid.

From what has been said, it will be seen that our conclusion is, that the plea is sufficient in law as a bar for so much of the suit as is covered by the note offered as a set-off. Also, that the evidence offered should have been admitted at the trial on the other issue.

Judgment reversed, and cause remanded.

HULL & LEAVENS v. THE PLANTERS AND MERCHANTS BANK OF MOBILE.

1. The transfer of negotiable notes by a separate deed of assignment, without delivery of the notes themselves, is not an endorsement, or such transfer as will vest the legal title in the transferee according to the law merchant, but is the assignment merely of a *chose in action*.

ERROR to the Chancery Court at Mobile.

This case was argued at the same time with the case of Hall v. Hallett and others, at the last term. It will be seen, however, from the opinion of the court in which the facts are sufficiently stated, that it is entirely dissimilar.

CAMPBELL, for plaintiff in error.
DARGAN, *contra*.

ORMOND, J.—It was contended in argument, that this case is identical in principle with the case of Hall v. Hallett, et al. decided at the present term. In that case, it was held, that receiving a negotiable note by indorsement, in payment and discharge of a pre-existing debt, was a taking in the usual course of trade, and that the holder was not affected by the equities between the original parties, of which he had no notice.

The facts of this case are briefly these: The complainant, Hull, purchased lots in the city of Mobile, from one Solomon Andrews, and executed his notes therefor, payable in bank, the two last of which fell due, one on the 1st November, 1840, for $5,200, and one on the 1st November, 1841, for $5,440—That at the time of the sale, there was a mortgage upon the lots, in favor of William R. Hallett, which Andrews fraudulently concealed, and which is still subsisting, and in part, unsatisfied—That in April, 1837, Andrews absconded from the State, insolvent, and was imprisoned in New-Orleans, as a fraudulent debtor, by the Planters' and Merchants' Bank. The two notes above described, with others, were, by Solomon Andrews and H. M. Andrews & Co. (which firm was composed of S. Andrews and H. M. Andrews) assigned to the firm of Andrews & Brothers, composed of J. Andrews, Z. Andrews and E. Andrews, to secure them for debts and liabilities of S. Andrews and H. M. Andrews & Co. H. M. Andrews & Co. and S. Andrews, being indebted to the Planters' and Merchants' Bank of Mobile, an arrangement was entered into between the Bank and E. Andrews, acting for the firm of Andrews & Brothers, by which the latter became bound for one hundred thousand dollars, and also assigned to the bank about one hundred and fifteen thousand dollars in notes and bills, of the effects of S. Andrews and H. M. Andrews & Co. which had been assigned to them by the latter, for the purpose above stated, the Bank transferring to Andrews & Brothers, their claims on S. Andrews and H. M. Andrews & Co. This transaction took place on the 28th of June, 1339, and was evidenced by a deed of that date. None of the notes or bills were in the possession of E. Andrews when the agreement was entered into; the two notes of the complainant, Hull, being then in the possession of the Bank of Mobile, to which it had been delivered previously, to hold as collateral security for liabilities of Andrews & Brothers to the Bank, and for which an order was given to the Planters' and Merchants' Bank, where the principal debt was paid.

The object of the bill is, to have the notes credited by the amount still due on the mortgage to Hallett.

The general doctrine is very clear, that any one in possession of a negotiable security, may, by indorsement, vest a complete title to it, though he may have obtained it by fraud, or for an entirely different purpose, if the indorsee gives a valuable conside-

ration for the transfer, and is not affected with notice of the fraud or want of title. This is necessary to render them negotiable, and in all cases of instruments negotiable by the law merchant, the presumption of law is, that the title is with the possession.—[Collins v. Martin, 1 B. & P. 648; Grant v. Vaughan, 3 Burr. 1524; Miller v. Race, 1 ib. 452; Peacock v. Rhodes, 2 Douglass, 633.]

It results as a corollary from the proposition above stated, that if the transferee has notice at the time of the transfer of the fraud or other defence to the instrument, he will be affected by it, and the instrument in his hands will be subject to the same defence as if it had never been negotiated, unless it has been said he can deduce a title from some one upon the bill not affected with notice, a question which does not arise in this case.

The only question necessary to be settled, is, whether the Planters' and Merchants' Bank, have such a title to the notes in question, as by the rules of the law merchant, will protect it against the latent equity of the complainant.

To vest the legal title in a negotiable instrument, it must, according to the law merchant, be transferred to the holder. If it be payable to bearer, the transfer may be by delivery; if payable to order, it can only be by an indorsement on the paper itself, or at least on one attached to it. [Story on Bills, 222, and cases cited; Chitty on Bills, 251; Gibson v. Minet, 1 H. B. See the opinion of C. J. Eyre, at page 605–6.] This results from the rule, that the title and possession of a negotiable security, are inseperable—the property passes with the possession. In the language of C. J. Eyre, in Collins v. Martin, [1 B. P. 648,] "every holder with the bill, takes the property, and his title is stamped upon the bills themselves."

Tested by these rules, it will be perceived that the transfer of the notes in this case to the P. and M. Bank, has not one of the properties of the endorsement of a negotiable security. When the agreement was entered into by the P. and M. Bank, with E. Andrews, the notes were not in the possession of Andrews, but were then in the custody and under the control of the Bank of Mobile, to which they had been pledged by Andrews as collateral security. The transfer was not made by endorsement on the notes, but by a deed of assignment, by which these notes, with other securities, were conveyed to the Bank. Nor did the Bank, by the con-

tract, become entitled to the possession or control of the notes, but received an order for their delivery, when the debt for which they were pledged, should be discharged. This was then, at most, an assignment of the interest which the assignor had in the notes at the time of the assignment, and whatever may be the interest which the Bank took by the assignment, it certainly did not receive the legal title according to the custom of merchants. It was in truth, but the assignment of a *chose in action*, which subjects the assignee to all the defences which existed against the payee at the time of the assignments.

In Hopkirk v. Page, [2 Brock. 41,] where negotiable securities, as in this case, had been transferred by a deed of assignment, Chief Justice Marshall holds the following language: "Nothing can be more anti-commercial than the idea of transferring negotiable paper by a deed, transferring a vast number of bills, bonds, notes and accounts. Such an instrument may very properly be considered as conveying the equitable interest, the right to receive the money, but cannot be considered as a negotiation of the bill upon mercantile principles, or according to mercantile usage, so as to authorize the holder to sue in his own name. The books treat of no such mode of transfer."

It is true, that by our statute, the assignee is vested with the legal title, but the Bank can derive no aid from that circumstance, because the statute subjects the assignee to all the defences which existed to the note at the time of the transfer.

This view being decisive in favor of the decree made by the chancellor, we have not considered it necessary to enter upon the inquiry, whether upon the other facts disclosed by the record, the Bank could be considered a *bona fide* holder for a valuable consideration, and the decree is consequently affirmed with costs.

THE STATE v. MURPHY.

1. An indictment is unobjectionable, both in form and substance, which alleges a conspiracy falsely and fraudulently to seduce from her virtue, and carnally to know an unmarried female, by procuring the consent of herself and parents, to her marriage with one of the conspirators; and then in furtherance of such conspiracy, producing a forged licence, assuring them of its genuineness, falsely and fraudulently representing another of the conspirators to be authorised to celebrate the espousals, who actually performed the ceremony; in consequence of all which the daughter and her father and mother were deceived, &c., and she cohabited with her pretended husband. And in such case it is immaterial whether a licence was necessary to the validity of the marriage or not.
2. It is an essential constituent of the crime of rape that the act should have been committed by force, and against the will of the female.
3. A conspiracy to commit an offence is not merged when the conspiracy is executed, where the conspiracy and the act done are misdemeanors of the same grade; but the indictment may be framed with a view to the punishment of either.
4. *Quere?* Are not the statutes in respect to the obtaining a licence to celebrate the contract of espousal, and the form of its solemnization, directory merely; and is it not competent for persons of proper age to consummate the contract *per verba de præsenti*, without a license, or the interposition of one of the functionaries, designated by the law.

On points referred by the Circuit Court of Butler.

The indictment charges that the defendant, with other persons, whose names are particularly mentioned, did, on the 4th of February, 1843, conspire, &c., wickedly, maliciously, &c., to seduce from her virtue one Temperance Buckalow, a young maiden lady; and to assist and enable "John Henry Watts to effect a pretended marriage with the said Temperance Buckalow; and to make John Buckalow and Temperance Buckalow, sen., (father and mother of the said Temperance,) believe it to be legal, and thereby to enable him, the said John Henry Watts, carnally to know her, the said Temperance Buckalow, without legal matrimony between them, the said John Henry Watts and Temperance Buckalow."

The indictment further charges, that John Henry Watts, Wilson Murphy and the other conspirators afterwards, on the 24th of March, 1843, in pursuance of, and according to the conspiracy,

&c., had as aforesaid, did repair to the house of John and Temperance Buckalow, father and mother, &c., and falsely represented to them and their daughter, Temperance Buckalow, that the said John Henry Watts had obtained a license from the clerk of the county court of Butler, giving authority to any one legally authorized to celebrate the rites of matrimony between the said John Henry Watts and the said Temperance Buckalow. It is further charged, that the said John Henry Watts, Wilson Murphy and the other conspirators, in pursuance of the said conspiracy, did produce to the said John Buckalow and Temperance Buckalow, the father and mother, and Temperance, daughter as aforesaid, on the day and year last aforesaid, at the house of John Buckalow, in the county aforesaid, a paper which they falsely represented to the father, mother and daughter, as the said marriage license: and that sterling B. Parker (one of the conspirators) represented himself as being then and at that time a justice of the peace for Butler county; and he did then and there unlawfully marry the said John Henry Watts and Temperance Buckalow: and the said John Henry Watts then and there, pretending to be the lawful husband of the said Temperance, went to bed with her, &c.

On this indictment, a *capias* issued, requiring the arrest of all the conspirators, which was executed on the defendant only; who raised the following points upon demurrer:

1. That the indictment did not show any offence had been committed; because, in charging the conspiracy, it used the present instead of the past tense.

2. The indictment did not show that the conspiracy was to seduce Temperance Buckalow against her consent, or the consent of her parents; and because it did not show that the conspiracy was thus consummated.

3. The indictment shows the conspirators, in consummating their purpose, to have committed a civil trespass, and the conspiracy cannot be punished as an offence.

4. The conspiracy charged is not indictable, because the act done in pursuance of it, is a misdemeanor only.

5. The act is a felony more highly penal than the conspiracy; and the conspiracy is not indictable.

The demurrer was overruled; and the questions of law thereupon raised, being deemed novel and difficult, were referred to

this court for its decision—the defendant having been first adjudged guilty upon plea and verdict.

G. W. Gayle, for the defendant.—1. The law punishes offences committed, and not those which are merely contemplated. Every thing must be specifically alleged, and nothing can be taken by intendment. [3 Stew't Rep. 123.]

2. To this point, he cited Roscoe Crim. Ev. 366; Russ. on Cr. 498; and insisted that there was a marriage *de facto;* consequently the actors were not chargeable with a crime. [33 Law Lib. 25, 28, 45; 4 Phil. Ev. 286; 1 Chit. Plead. 63, note B.]

3. A conspiracy to commit a trespass is indictable. [2 Russ. on Cr. 503.] If there was not a marriage, then it was a case of debauchery, for which the father has a remedy by action of trespass *per quod servitium amisit;* and the daughter's injury may perhaps be repaired by suit. [1 Chit. Plead. 164.]

4. Where a felony or a misdemeanor is in fact committed in pursuance of a conspiracy, the conspiracy is merged and cannot be punished as a distinct offence. [5 Mass. Rep. 106; Roscoe's Crim. Ev. 258; 34 Eng. C. & Rep. 383, 392.] The offence charged to have been committed, amounts to a rape, and merges the conspiracy, because it is more highly punished. [1 Russ. C. Law, 526, 8, note 16; Arch. C. Plead. 375; 34 Eng. C. & Rep. *ut supra;* Clay's Dig. 430, 3, 414.]

Attorney General, for the State. The conspiracy to procure the consent of Miss Buckalow by fraud or false affirmations, amount to such a contrivance as the law denounces an offence. [3 Chitty's C. L. 1179; 1 Leach's Cr. L. 39; 3 Burr. Rep. 1321; id. 1434; 2 Yeates' Rep. 114.]

All conspiracies to prejudice another in person, property, or character are offences at common law; and our statute is merely declaratory of the common law. True, in consummating the conspirators' design, a private injury was perpetrated, yet this did not atone for the offence against public morals. [2 Hawks. C. L. 72, § 2; 3 Chit. Cr. L. 1139; 2 Yeates', *ut supra*; 1 Dev. Rep. 357.]

The conspiracy was a misdemeanor, though it was necessary to show some *overt act* as the statute requires. The consummation of the conspiracy is nothing more than a misdemean-

or; and between offences of equal grade there can be no merger. It is allowable to punish the first offence, or to elect for which the indictment shall be framed. [4 Wend. Rep. 265.]

Morally, the conspirators, in acting out their purpose, may have been guilty of a rape; but at common law, force must have been employed in order to make out that crime, and the case does not come within our statute which enlarges the offence. [4 Bla. Com. 210; 1 Hawk. P. C. 121; 3 Chit. Cr. L. 810; Wheeler's Cr. Cases, 152.]

COLLIER, C. J.—The indictment, it is believed, is sufficiently precise and direct in its allegations, so that the question is, whether the offence it attempts to charge is punishable by law.

A conspiracy is said to be a consultation or agreement between two or more persons, either falsely to accuse another with a crime punishable by law, or wrongfully to injure or prejudice a third person, or any body of men in any other manner; or to commit any offence punishable by law; or to do any act with intent to prevent the course of justice; or to effect a legal purpose with a corrupt intent, or by improper means. [1 Hawk. P. C. chap. 27, § 2, *et post;* Arch. Cr. Plead. 390–1; 4 Bla. Com. 136, n. 31; 3 Chitty's C. L. 1139; 2 Russ. on Cr. 553.] In Taylor and Robinson's case, [Leach's Cr. Law 39,] a woman living in the service of her master, conspired with another man that he should personate her master, and in that character should solemnize a marriage with her; which was accordingly done, for the purpose of afterwards raising a specious title to the property of the master. The gist of the indictment was for the conspiracy, and the conviction was founded on that ground. It was considered that, although no actual injury was proved, yet it was the province of the jury to collect from all the circumstances of the case, whether there was not an intention to do a future injury to the person whose name was assumed. So a conspiracy to seduce a daughter from her father's house, &c., has been held to be an indictable offence. [Rex v. Lord Grey and others, 1 East's P. C. chap. 11, § 10; Rex v. Sir Francis Blake Deloval, and others, 3 Burr. Rep. 1434.]

In The State v. Buchanan, [5 Har. & Johns. Rep. 317, 368,] the law applicable to conspiracy as a criminal offence is most elaborately and learnedly considered. The conclusions of the court are, that an indictment will lie at common law—1st, For a

conspiracy to do an act not illegal, nor punishable, if done by an individual, but immoral only. 2d, For a conspiracy to do an act neither illegal nor immoral in an individual, but to effect a purpose, which has a tendency to prejudice the public. 3d, For a conspiracy to extort money from another, or to injure his reputation by means not indictable if practised by an individual, or by verbal defamation, and that whether it be to charge him with an indictable offence or not. 4th, For a conspiracy to cheat and defraud a person by means of an *act*, which would not in law amount to an indictable cheat, if effected by an individual. 5th, For a malicious conspiracy to impoverish or ruin a third person in his trade or profession. 6th, For a conspiracy to defraud a third person by means of an act not *per se* unlawful, and though no person be thereby injured. 7th, For a bare conspiracy to cheat or defraud a third person, though the means of effecting it should not be determined on at the time. 8th, That a conspiracy is a substantive offence, and punishable at common law, though nothing be done in execution of it. 9th, That in a prosecution for a conspiracy, it is sufficient to state in the indictment, the conspiracy and the object of it; the means by which it was intended to be accomplished need not be set out, being only matters of evidence to prove the charge, and not the crime itself.—[See, also, Commonwealth v. Judd, et al. 2 Mass. 329; State v. Rikey and others, 4 Hals. Rep. 293; Commonwealth v. Tibbetts, 2 Mass. Rep. 536; Commonwealth v. Warren, 6 id. 74; Commonwealth v. Davis, 9 id. 415; The King v. Edwards, 8 Mod. Rep. 320; Rex v. Eccles, and others, 13 East's Rep. 230; The King v. Nicholls, id. 412; Lambert v. The People, 9 Cow. Rep. 569; 3 Chitty's C. L. 1139, *et post*, and cases there cited.]

In the case before us, it is explicitly alleged, that the object of the conspirators was to impose on Temperance Buckalow, and her father and mother by inducing them to believe that a forged license was genuine, and that one of their number was a justice of the peace authorized to celebrate the rites of matrimony; and thus obtain the consent of the father, mother and daughter to the marriage of the latter, &c. Whether the act contemplated would be illegal or punishable if done by an individual, we need not consider; for it is clear that it was eminently immoral, and intended to deceive and defraud, and this is quite sufficient to constitute the offence of conspiracy.

Conceding, for the purposes of this argument, that the espousals may be celebrated and the matrimonial connection formed without the authority of a license first obtained from the clerk, and still the defendant may be guilty. Miss Buckalow might, (as every woman should,) have refused to unite her fortunes with a lover, unless the appropriate office furnished record evidence that the conjugal relation was duly consummated between them So the assent of the parents may have been yielded to the formation of this most important relation, upon the condition that it was celebrated according to the directions of the statute. The deception practised by means of the forged license, and misrepresenting the official character of the person who undertook to repeat the marriage ceremony, when considered in its consequences, is a high offence against morals; and merits the full measure of reprehension with which it is visited by the law.

It is insisted for the defendant, that although the conspiracy may have been an indictable offence, yet having been consummated by the commission of a felony, the conspiracy is merged in the act which was done, and is no longer punishable as a misdemeanor. The indictment does not allege a carnal knowledge by force, but merely that the purpose of the conspirators was effected by fraud. It is an essential constituent of the crime of *rape*, that the act should have been committed by force and against the will of the female. [4 Bla. Com. 210; 3 Chitty's Cr. L. 810; 1 Russell on Cr. 556, *et post*, and cases there cited; 1 Hawk. P. Cr. 121, *et post.*] If a woman be beguiled into her consent by marrying a man who had another wife living, or by causing the nuptials to be illegally celebrated, and persuading her that the directions of the law had been observed; in neither case will the pretended husband be guilty of a rape. There are cases which lay down the law in general terms, that wherever the consent is obtained by fraud, the crime has not been committed.—[Regina v. Saunders, 8 Carr. & P. Rep. 265; Regina v. Williams, id. 286; 3 Chitty's Cr. L. 810; Commonwealth v. Fields, 4 Leigh's Rep. 648.]

In The People v. Mather, [4 Wend. Rep. 265,] the court say, "It is supposed that a conspiracy to commit a crime is merged in the crime when the conspiracy is executed. This may be so where the crime is of a higher grade than the conspiracy, and the object of the conspiracy is fully accomplished; but a conspi-

racy is only a misdemeanor, and when its object is only to commit a misdemeanor, it cannot be merged. Where two crimes are of equal grade, there can be no legal technical merger."

In the case of the Commonwealth v. Kingsbury, et al. [5 Mass. Rep. 106,] the defendants were charged with the fraudulent removal of goods upon a conspiracy previously formed, under such circumstances as made them guilty of a felony. The question was raised whether the defendants could be prosecuted for the conspiracy, and the court was of opinion that if the conspiracy had not been effected, it might have been punished as a distinct offence; "but a contrivance to commit a felony, and executing the contrivance, cannot be punished as an offence distinct from the felony, because the contrivance is a part of the felony, when committed pursuant to it. The law is the same respecting misdemeanors. An intent to commit a misdemeanor, manifested by some overt act, is a misdemeanor; but if the intent be carried into execution, the offender can be punished but for one offence." The latter branch of the quotation must be regarded as a mere *dictum* of the court. Having determined that the act done was a *felony*, and for that reason the conspiracy was merged, the case did not require an opinion as to what would be the effect of the act upon the conspiracy under which it was consummated, where it was a misdemeanor of equal grade with the conspiracy itself. The case cited from *Wendell* is more consonant with principle, and we do not hesitate to recognize it as authoritative.

What offence was committed by the marriage? This, we have seen, when followed by the consequences alleged in the indictment, did not amount to a rape. We can only regard it as merely carrying out the conspiracy, which was an offence in itself whether consummated or not.

We have said that the guilt of the conspirators cannot be affected by the validity of the marriage between Miss Buckalow and Watts, and perhaps we should be going beyond what strict duty requires, were we to consider whether, what transpired, established the relation of husband and wife. It may, however, be remarked, that the solemnization of the contract of espousal is *non juris naturalis aut divini*, but it is *juris positivi*. [Calmet's Dic. Marriage, tit. Marriage; Watson's Dic. Marriage, 621–2; Step. Com. 286; Shelford's Law of Mar. 3. *et post*, and notes. See, also, the authorities cited below.] Marriage, then, being a civil con-

tract, may it not be consummated by persons of competent age, &c., *per verba de presenti*, where there is no statute which impliedly or expressly declares *it void* if not solemnized according to express forms? Are not our statutes in respect to marriage directory rather to the officer who is authorized to issue a license, and the functionaries who are to celebrate it, than to the parties who enter into this relation? If this be so, could Watts be heard to object that he had not taken Miss Buckalow for his wife, if they both, in answer to the usual questions, assented to a union?—Whether she might not, if overreached by misrepresentation and fraud, repudiate him, is another question. [Clay's Dig. 372, 374; Londonderry v. Chester, 2 New Hamp. Rep. 268, and cases there cited; Dumaresly v. Fishly, 3 A. K. Marsh. Rep. 368; Fenton v. Reed, 4 Johns. Rep. 52; Jackson v. Winne, 7 Wend. Rep. 47; Milford v. Worcester, 7 Mass. Rep. 48; 3 Phil. Ev. C. & H.'s notes, 1147; Shelford's Law of Mar. 3 to 38; Newberry v. Brunswick, 2 Verm. Rep. 160; Cram v. Burnham, 5 Greenl. Rep. 216; Huntz v. Searly, 6 Binn. Rep. 405; Jackson v. Claw, 18 Johns. Rep. 346; Bashaw v. Tennessee, 1 Yerger's Rep. 117; Reeve's Dom. Rel. 196, 200, 290; Pearson v. Howey, 6 Hals. Rep. 17, opinion of Ford, Justice; 4 Kent's Com. 4th ed. 74 to 93, and citations there made.]

Without undertaking to consider the questions we have stated, we have thought it proper to propose them and cite the authorities by which they may be answered, that the parties who were the principal persons in the drama, may be brought understandingly to inquire in what relation they stand to each other. What we have said is decisive of the case, and we have only to add, that the judgment of the circuit court is affirmed.

KENAN v. STARKE AND MOORE.

1. A scroll around the word seal, opposite to the signature of the judge who signs the bill of exceptions, is a sufficient seal.
2. In a suit by two as partners, it is admissible for the defendant, under the general issue, to prove that the debt sued for is due to one of them, and not to the plaintiffs jointly. The statute dispensing with proof of the partnership, unless put in issue by plea in abatement, [Clay's Dig. 324, § 68,] does not apply when the contract is with an individual, and the suit is by a partnership.
3. It is not error to refuse to charge a jury, in a suit for goods, bargained, sold, *and delivered*, that no recovery can be had unless a delivery is proved, if a contract of sale is proved; for the seller is not bound to deliver until the price is paid, and the common counts are sufficiently broad to permit a recovery on the contract of ale, without proof of delivery also.

WRIT of error to the county court of Dallas.

Assumpsit by Starke and Moore, as partners against E. Kenan as the administration of M. J. Kenan, deceased, on the common counts. The defendant pleaded non assumpsit, statute of *non claim*, and payment; on which there were issues. At the trial, the plaintiffs proved that one Blount had been one of the executors of Kenan, that he qualified as such on the 28th of August, 1837, and having settled up, he resigned, and was discharged by the proper court on the 14th February, 1839. They then produced and offered as evidence, a paper in these words:

"Received of John G. Moore, an account against the estate of M. J. Kenan, amounting to $720 70, filed with me as one of the executors of the estate.—Mobile, 30th September, 1837.

F. S. BLOUNT, Ex'r."

They proved that the whole of this receipt was in the hand writing of Blount. This was all the proof in relation to the paper, or with regard to the time when the claim was presented.—The defendant moved the court to exclude the paper from the jury, which the court refused to do.

The defendant offered a witness to prove that the plaintiffs were not partners at the time when the supposed indebtedness accrued, as alleged in the declaration, and that if the estate of Kenan was indebted, it was to Starke alone, and not to the plaintiffs jointly.

This witness was excluded by the court, and his evidence not permitted to go before the jury.

The defendant requested the court to instruct the jury, that if there was no evidence before them of a presentment of the claim sued on, except the paper above referred to; and if there was no proof that the said paper was executed by Blount, while executor, except that it purports to bear date at a time when he was so, then that there was no sufficient proof of the presentment. This was refused.

He also asked the court to instruct the jury, that there must be proof that the goods alleged to be sold, were delivered, or proof of some act between the parties amounting to a delivery. This was refused, and the defendant excepted to the several opinions of the court, ruling these points against him. They are now assigned as error.

EDWARDS, for the plaintiff in error.

G. W. GAYLE, *contra*—Made the following points: 1. The court cannot notice the bill of exceptions; as it is not under seal. [Minor, 66; 5 S. & P, 330.] A sealed instrument must express upon its face the intention to make it such. [4 Ala. Rep. 140.]

2. It was unnecessary to do more than prove the signature of Blount to the receipt.

3. The question as to the existence of the partnership of the plaintiffs, could only be raised by plea in abatement. [Clay's Digest, 324, § 68.]

4. Proof of delivery was not essential, if a sale was made out. [Chitty on Con. 113; 3 Ala. Rep. 678.]

GOLDTHWAITE, J.—1. The defendant in error, asserts that no examination can be had of the questions attempted to be raised; because the bill of exceptions has no seal affixed. We shall not now consider whether such an omission would cause exceptions, otherwise sufficiently certified to be rejected, because, in our opinion, the transcript does not sustain the objection. On reference to it, we find the presiding judge has added, after his name, the word seal, and there is a scroll around it. Applied to a bill of exceptions, this must be considered as what it purports to be.

2. The offer of the defendant below to prove that the plaintiffs were not partners when the supposed indebtedness accrued, and that the debt, if due at all, was due to one of them individually, is not a matter controlled by the statute referred to. That provides, that when plaintiffs shall bring suit as a firm or partnership, it shall not be necessary for proof to be made, that the individuals named as plaintiffs, constitute the members of the firm, unless the defendant puts the same in issue, by plea in abatement. [Clay's Digest, 324, § 68.] The attempt here was not to show that the firm suing, was composed of other persons than those alleged, but was to prove that the indebtedness was to a single individual. The statute was intended to prevent the necessity of proof of the individuals composing a partnership whenever the contract was made with a partnership by name; but when the contract is made with an individual, and the attempt is to recover it in the name of a partnership, the statute has no operation whatever. There was error, therefore, in refusing to allow this evidence.

3. The charge asked with respect to the necessity for proof of a delivery of the goods sold, is not presented in such a manner as to show error, because we cannot infer what the proof was. A delivery is not essential to be proved, to give a right of action in all cases, as the seller is not bound to deliver his wares without payment made, and he may maintain an action for the price, upon the contract of sale.

4. The other charge with respect to the effect of the admission by Blount. the previous representative of the estate, that the account was presented to him within eighteen months after grant of administration is concluded by the decision upon that point, made when the case was here at a former term. [Starke & Moore v. Kenan, 5 Ala. Rep. 590.]

For the error we first noticed, the judgment must be reversed, and the cause remanded.

DEARING v. MOFFITT.

1. A promise by a bankrupt "that he had been decreed a bankrupt, but still intended to pay the note—that he considered it a debt of honor, and though discharged as a bankrupt, he did not intend to avail himself of that advantage, but had some work engaged, from the proceeds of which he intended to pay the plaintiff," is not an absolute but a conditional promise, and to recover upon it it is necessary to show that the state of things existed upon the happening of which the promise to pay depended.

ERROR to the Circuit Court of Perry.

Assumpsit by the defendant against the plaintiff, on a promissory note.

The defendant pleaded in bar of the action, that he had been decreed a bankrupt before the commencement of the suit.

To this plea, the plaintiff demurred, and the court overruling the demurrer, the plaintiff replied to the plea, that after the decree in bankruptcy, and before the certificate in bankruptcy was granted, as also before the commencement of the suit, the defendant promised to pay the debt. Issue being joined thereon, the plaintiff proved that the defendant, when applied to for payment of the debt, said that he had been decreed a bankrupt, but still intended to pay the debt—he considered it a debt of honor, and though discharged as a bankrupt, he did not intend to avail himself of that advantage. That he had some work engaged, from the proceeds of which, he intended to pay the plaintiff—that the debt was for the rent of the plaintiff's house, whilst she lived in the kitchen.

This being all the evidence, the defendant demurred thereto, and the plaintiff joined in the demurrer, and thereupon, the court determined the issue for the plaintiff, and rendered judgment thereon, which is now assigned for error.

T. CHILTON, for plaintiff in error—contended that the promise was insufficient; that if it could be considered a promise, it was conditional, and to recover on it, it was necessary to prove that the contingency on the happening of which the payment was to

be made, had arrived. He cited 1 Starkie's Rep. 370; 4 Espinasse, 36; 5 id. 198; 2 Starkie's Ev. 210; Douglass, 182.

Davis, for defendant in error.—The plea is bad in not alleging that the bankrupt had obtained his final certificate. To show that the promise was sufficient, he cited 1 Chitty, 60, 14 Johns. 178; 8 Mass. 127; 35 Law Lib. 429; 1 Stephens' N. P. 696.

ORMOND, J.—The view we take of this case, renders it unnecessary to consider any other question than the effect of the promise relied on as a waiver of the decree in bankruptcy.

It cannot be doubted that an express and unequivocal promise to pay a debt owing by a bankrupt, made after his discharge, will prevent him from relying on his certificate as a discharge, and the only question here is, whether the promise relied on in this case, is of that character.

The first member of the sentence is a declaration, that the debt was of such a character, that it created an honorary obligation for its payment; that, therefore, he intended to pay it, and would not avail himself of his discharge as a bankrupt. We do not consider that this is an absolute unconditional promise to pay the debt, but is merely a declaration, that at some future time, it should be paid. It cannot, however, be disconnected from what follows this statement, "that he had some work engaged, from the proceeds of which, he intended to pay the plaintiff" As a promise is merely evidence of the determination of the mind to do a particular act, there does not seem to be any reasonable distinction between, *I will pay*, and *I intend to pay*, on the happening of a particular event. This is then a promise to pay out of a particular fund, which the bankrupt expected to receive, and according to all the authorities, he is liable only according to his promise. If that is conditional, it must be shown that the contingency has happened. Thus, in Bessford v. Saunders, [2 H. Blackstone. 116,] the promise by the bankrupt was, that "the plaintiff should no be a loser, but that he would pay when he was able." This was held to be a conditional, and not an absolute promise, and that to recover, the plaintiff must prove the ability of the bankrupt to pay. To the same effect, is Kingston v. Wharton, [2 S. & R. 208.] This is the established doctrine in relation to conditional promises, relied on to take a debt out of the in-

fluence of the statute of limitations, between which, and a discharge in bankruptcy, the analogy appears to be perfect.

We are, therefore, of the opinion, that the promise in this case, is not absolute, but conditional, and that to recover upon it, it is necessary to prove that the state of things existed, upon the happening of which, the promise to pay depended. Let the judgment be reversed, and the cause remanded.

THE STATE v. GUEST.

1. The Judge of the county court is not authorised to award a *habeas corpus* to bring before him the body of a prisoner committed for a felony; but if he does so, and remands the prisoner, because he is unable to give bail, the imprisonment may be referred to the original warrant for his detention, and he will be considered legally in custody.

On a point referred, from the Circuit Court of St. Clair.

The defendant was indicted under the 16th section of the fifth chapter of the Penal Code, for having conveyed into the jail of St. Clair, a disguise, useful to aid Wade Hampton, who was confined therein, upon a charge of felony, to effect his escape, and with the intent thereby, to facilitate the same. The cause was submitted to a jury on a traverse by the defendant, a verdict of guilty was returned, and the defendant sentenced to two years imprisonment in the penitentiary. On the trial, the defendant excepted to the ruling of the court, and the questions of law thus raised, are duly referred for our decision. The bill of exceptions is substantially as follows; it was shown that Wade Hampton was lawfully committed to the jail of St. Clair county, for a felony, on the 25th of December, 1843; on the 3d of January, 1844, the Judge of the county court of St. Clair, caused Hampton to be brought before him on *habeas corpus*, ordered that he be admit-

ted to bail, and upon the failure to execute a recognizance, he be remanded to prison. Hampton did not give bail, and was remanded to jail under the order of the Judge of the county court; the sheriff still retaining the original *mittimus*. The defendant prayed the court to charge the jury, that if they believed the facts stated, then Hampton was not legally detained in custody after his recommitment by the Judge of the county court; this charge was refused, because the action upon the *habeas corpus*, was irregular, and the original commitment still continned in force.

S. F. Rice, for the prisoner—insisted that the point raised in the circuit court, was improperly ruled, and cited Clay's Dig. 462, § 3–4.

Attorney General, for the State—contended that the proceedings before the judge of the county court, were *coram non judice*, and could have no effect for any purpose.

COLLIER, C. J.—The third section of the twelfth chapter of the Penal Code, authorises the judge of the county court to issue a writ of *habeas corpus*, to cause to be brought before him, any person "confined in the county jail, on any cause whatever, other than a commitment for, or a conviction of felony, or by the sentence or decree of the circuit court, or court of chancery, &c;" and if the prisoner's detention is illegal, "he shall be discharged; if otherwise, he shall be committed by warrant to the proper custody, or admitted to bail, as may be in accordance with law."—Clay's Dig. 462.] The eighth section of the eighth chapter of the Penal Code, enacts that "the term *felony*, when used in any statute, shall be construed to mean an offence, for which the offender on conviction, shall be liable by law, to be punished by death, or for which, imprisonment in the penitentiary is made the appropriate punishment." [Clay's Dig. 439.] The offence for which the defendant was indicted, is punishable with "imprisonment in the penitentiary, not less than two, and not exceeding ten years." [Clay's Dig, 429.]

Taking these several enactments together, and it is perfectly clear, that the proceedings of the county judge upon the *habeas corpus* were *coram non judice*, and he had no authority to discharge Hampton from confinement. But, it by no means follows,

that, because that writ was improperly issued, the subsequent commitment was illegal, or the further detention unauthorised. Whether the judge was authorised to remand the prisoner, is a question which need not be considered: for it is clear, when he was again imprisoned, his confinement related back to the original warrant for his detention. This being regular, his imprisonment was legal, and the defendant in the case at bar, can claim no advantage from the unauthorised interference of the judge of the county court. The judgment of the circuit court, so far as referred to us for revision, is consequently affirmed.

CAVE, USE OF WALLACE, v. BURNS.

1. The statute, allowing the plaintiff's oath as evidence in all su'ts on accounts for sums not exceeding one hundred dollars, applies to a demand for fifty dollars due on a horse swap.
2. A judgment on a note executed by the defendent and the plaintiff, as the joint sureties of a third person, is proper evidence under a plea of set-off, as laying the foundation to prove the payment of money at the plaintiff's instance.
3. When the record does not disclose the fact, parol evidence is admissible to show that a judgment against the defendant is founded on a note to which he and the plaintiff were sureties for another, the plea being set-off, and the attempt made to show money paid at the plaintiff's instance.
4. When one co-surety has been compelled by suit to pay the joint engagement, it is not competent for a co-surety, when sued for contribution, to show that the note, as between the principal debtor and the payee, was without consideration.

WRIT of error to the Circuit Court of Dallas.

Action before a justice of the peace by Cave, for the use of Wallace, against Burns, to recover a less sum than fifty dollars. After a judgment for the defendant, the plaintiff appealed to the circuit court where he filed a statement containing the common counts. The defendant pleaded non-assumpsit, want of consideration, and set-off.

At the trial, the plaintiff's account for fifty dollars, for balance due on a horse swap, was offered to be proved by his own oath; which, on motion of the defendant, the court refused to allow.

The defendant offered, under the plea of set-off, a judgment obtained against one Harrison and himself, and offered to prove by parol that said judgment was founded on a note made by said Harrison as principal, and by the defendant and plaintiff as sureties, and that the amount of it had been paid in full by the defendant previous to the commencement of this suit. Also, that Harrison was insolvent when the judgment was rendered. The plaintiff resisted this evidence, and excepted to its admission.

The plaintiff then offered to show, that the consideration of the note given by Harrison as principal, and by the plaintiff and defendant as sureties, had failed; but the court refused to allow this evidence; and the plaintiff excepted.

The several matters excepted to are now assigned as error.

G. W. Gayle, for plaintiff in error.

Edwards, *contra*, insisted that plaintiff's oath was properly rejected. [Clay's Dig. 342 § 161.]

The money paid by the defendant as co-surety, was recoverable of the plaintiff. [Clay's Digest, 338 § 141.] And the question of consideration could not arise between the sureties. Whether with or without consideration, their relation to each other is the same.

GOLDTHWAITE, J.—1. The plaintiff's offer to prove his claim by his own oath, in our opinion, ought to have been allowed His demand was for fifty dollars, alleged to be due on an exchange of horses. Our statute permits this kind of evidence in all suits on accounts for a sum not exceeding one hundred dollars. [Clay's Digest, 342, § 161.] The term, account, in this statute does not mean several distinct items, but applies to any demand growing out of an express contract, even if it does not extend to implied ones, between the parties, and which is not evidenced by writing. The demand was not controverted by the oath of the defendant; and, therefore, the plaintiff's oath was admissible.

2. The record of the judgment upon the note, to which both

plaintiff and defendant were sureties for another person, was properly admitted, as laying the foundation for the defendant to prove his set-off, as, without that, it might be impossible to connect the payment with the surety debt. In this view, it was admissible, and, therefore, we need not inquire whether it might not be so in either aspects of the case.

3. It is also objected that parol evidence was admitted to show the judgment was founded on the note before spoken of. It may be that the record did not disclose the connection with the note, as would be the case if the declaration was alone on the common counts; for under these, the note could have been evidence. We are not informed what the condition of the record was; but the fact adverted to, is sufficient to prove that if such was the case here, the evidence was proper, and even absolutely necessary, to connect the note with the record. There is, therefore, no error in this particular.

4. The court properly excluded the plaintiff's evidence, when he proposed to show that the note, on which he and the defendant were sureties, had failed in its consideration. Conceding that this defence could have been made out, we do not perceive that it could affect the defendant's right to recover the proper proportion of the amount paid by him. No question of consideration is involved in the contest between co-sureties; for they enter into the undertaking without reference, as between themselves, to the consideration paid to their principal. If his contract was entirely without consideration, the relative rights of these parties would be precisely the same, and on payment by one, the right to contribution from the other is called into existence. Each has impliedly agreed with the other to protect him to the extent of the joint undertaking against the consequences arising out of the failure of the principal; and, therefore, when one has paid the whole or a part of the debt, he is entitled to recover from the other his rateable proportion. We do not find this point any where precisely adjudicated; but the case of Ford v. Keeth, [1 Mass. 139,] seems to turn on a question somewhat similar. There, the action was by a surety against his principal for money paid, and the latter defended on the ground, that the original contract was void for usury, by reason of which the surety might successfully have defended the suit against himself. It was held, however, that this did not excuse the principal from the action of the surety; nor

could it, unless express notice had been given to the surety of this defence by the principal, accompanied with a notice not to pay it. The same rule, we think, applies between co-sureties; and, therefore, the evidence offered was inadmissible.

For the error, in refusing the plaintiff's oath, the judgment is reversed, and the cause remanded.

ANDERSON v. COLLINS.

1. When the plaintiff and defendant are the only witnesses in an action upon an account for a sum not exceeding one hundred dollars, under the statute of 1839, the denial by the defendant, on oath, of the facts sworn to by the plaintiff, deprives the testimony of the latter of all force whatever.

ERROR to the County Court of Mobile.

GIBBONS, for the plaintiff—submitted the cause.

ORMOND, J.—The action was commenced by Collins, before a justice of the peace, on an open account, and judgment being rendered against him, he appealed to the county court. Upon the trial in that court, the plaintiff and defendant, were the only witnesses, and the defendant moved the court to charge the jury, that if they believed the defendant had, by his oath, contradicted the oath of the plaintiff, then they must find for the defendant, as there was no other testimony. The court refused the charge, and instructed the jury, that they must draw their own conclusions as to the contract. The jury found a verdict for the plaintiff, for twenty-five dollars.

As the sum in controversy in this case, exceeds twenty dollars, the parties could not have been examined as witnesses under the statute, authorizing the parties to be examined on oath, when the sum claimed is under twenty dollars. The only statute upon which the testimony of the parties to the suit was admissible, is the act of 1839. "In all suits to be commenced up-

on accounts for a sum not exceeding one hundred dollars, the oath of the plaintiff shall be received as evidence of the demand, unless the same be controverted by the oath of the defendant."—[Clay's Dig. 342, § 161.] It is plain, that the court erred in its charge. The denial by the defendant on oath, of the truth of the facts sworn to by the plaintiff, by the express terms of the statute, deprived it of all force as testimony, and there being no evidence before the jury of the justice of the demand, the jury should have been required to find for the defendant.

Let the judgment be reversed, and the cause remanded.

FOREMAN v. LAY, SURVIVING PARTNER, &c.

1. An attorney entered an appearance for the defendant, but when the cause was transferred to the trial docket, erased his name, writing thereon the word "mistake:" Held, that as the defendant had not been served with process, a judgment by *nil dicit*, or default, could not be rendered against him.

WRIT of error to the Circuit Court of Sumter.

R. H. SMITH, for the plaintiff in error.
BLISS & BALDWIN, for the defendant.

COLLIER, C. J.—This was an action of assumpit, at the suit of the defendant in error against the plaintiff, as the acceptor of a bill of exchange. The writ was returned, "not found"; but at the return term, an appearance was entered for the defendant by an attorney of the court. After the cause was placed on the trial docket, and before the same was called, the attorney who had appeared, erased his name from the docket, the word "mistake," being written thereon. Notwithstanding this condition of the case, the defendant was permitted to take a judgment by *nil dicit*. The question is, whether an attorney who has entered an appearance, by mistake, can be permitted to withdraw the same.

We can discover no sufficient reason why a mistake of this kind may not be corrected. In fact, it would have been improper for the court, when advised of the facts, to have permitted the appearance to stand to the prejudice of the defendant. If he had never employed an attorney to represent him, no one could with propriety undertake to do so, and it would be competent to prevent the consequences which would result from such an act, by striking from the cause the name of one, who had either designedly or by mistake thus connected himself with it.—Whether an attorney who had thus appeared, and occasioned a loss to the adverse party, would not be liable to him in damages, we will not undertake to say; but his name being erased, the defendant would be unrepresented; and not being before the court by the service of process, no recovery could be had against him.

The judgment of the county court is reversed, and the cause remanded.

STARKE, ET AL. V. HILL.

1. Neither fraud or failure of consideration can be given in evidence to defeat the recovery at law of a note given for the price of land, when a deed containing covenants of warranty running with the land has been accepted by the purchaser, his relief is in a court of equity.

WRIT of error to the Circuit Court of Tallapoosa.

Assumpsit by Hill, as the administrator of John C. Webb, suing for the use of Todd, against Starke and others, as the makers of a promissory note. At the trial, the defendants proved that the note was given for certain tracts of land, which formerly belonged to John C. Webb, since deceased, and that they were sold by the plaintiff as administrator, with the will annexed on the estate of said Webb, but the will contained no authority to make the sale, nor was there any order of court authorising the plaintiff to sell the land. At the sale, the plaintiff represented

that he had full authority to sell said lands by virtue of the will of Webb, and the same were purchased under such representation. That the purchasers have never had the possession of the lands. That soon after the sale, the plaintiff absconded from the country, and the county court of Chambers appointed in his stead, one Hooper, as administrator, with the will annexed of Webb, and the same court granted to the latter an order of sale for the land, by virtue of which it was sold, and purchased by a stranger.

The plaintiff then produced in evidence a deed, with covenants of seizin, that the premises were free from incumbrances; that the grantor had a good right to convey; and of general warranty against all persons as administrator of Webb, from him to the defendant Starke, for said lands.

On this state of proof, the defendants requested the court to instruct the jury,

1. That if they believed the note sued on was given in consideration of the sale of the lands by the plaintiff, as administrator of Webb, without any authority for making the sale, and that the defendants nor either of them, have never had possession, then the sale was void, and the note without consideration.

2. That if the plaintiff on the sale of the lands, represented that he had full authority, by virtue of the will of Webb, to sell the lands, and they were purchased by Starke under this representation, and that it was false, this then should be considered by the jury as evidence of fraud; and if they believed the sale fraudulent, it was void, and the note could not be recovered.

These instructions were refused, and the jury charged, that if the note was given in consideration of the sale by the plaintiff as administrator of Webb, and the defendants had accepted the deed for said lands, they could not inquire into any fraud in the sale or failure of title.

The refusal to give the instructions asked for, and those given are here assigned as error.

W. P. Chilton, for the plaintiff in error.
No counsel appeared for the defendants.

GOLDTHWAITE, J.—This case presents substantially the same facts as those upon which the decision in Cullum v. Branch

Bank at Mobile, [4 Ala. Rep. 21,] was founded. That determines that the acceptance of a deed with warranty, prevents the purchaser from setting up either fraud or failure of consideration at law, in defence of a note given for the purchase of land. And also. that a court of equity is the proper forum to apply for relief, when it is wished to rescind the contract.

Judgment affirmed.

O'BRIEN v. Doe ex dem. HENRY.

1. An entry to re-vest an estate for a breach of a condition subsequent, must be such a notorious and unequivocal act as demonstrates the intention of the grantor to terminate the previous estate.
2. Where fourteen lots of land in Mobile, situate on opposite sides of a street, were conveyed by one deed, with a clause of forfeiture—*Held*, that an entry upon the lots on one side of the street, for a breach of the condition, was not of itself an entry upon the lots upon the other side of the street.
3. A long possession by the grantor, acquiesced in by the grantee, might be sufficient to raise the presumption that the original entry was for a breach of the condition, but no such presumption can be made when the possession is recent, and especially where it is forcibly taken.
4. When the grantor seeks to establish his right to enter for a breach of the condition subsequent, he assumes the burthen of proving it, though it consists of a negative; but in such a case slight proof would be sufficient, *prima facie*.

Error to the Circuit Court of Mobile.

Ejectment by the defendant against the plaintiff in error for a lot in Mobile, and judgment that he recover the possession.

On the trial, as appears from a bill of exceptions, it appears that the plaintiff offered in evidence a certified copy of a registered deed, purporting to be made by Joshua Kennedy, the landlord of the tenant in possession, to Bodo Adams. To account for the absence of the original, the plaintiff made oath that he never had said deed. That Bodo Adams had removed to Mississippi where he now resides; that on application to Adams, he

replied, that he had handed all the papers concerning the transaction to Thomas Reid, his agent in Mobile; that on application to Reid, he denied having it, and stated that he had handed all the papers to one John H. Jones, Esq., as attorney at law, for the purpose of commencing suit; that he applied to Jones, who promised to look for it, but did not furnish it—that Jones had quit practicing law in Mobile, and now resides in the country; that one John Hall claimed to have the papers of Jones in his custody, and that Hall, on application after search made, could not find the original deed, but did find the copy now offered in evidence. The court admitted the copy in evidence, to which the defendant excepted.

The plaintiff also offered in evidence, conveyances by deed for the premises sued for from Bodo Adams to A. Fouche—from him to J. Antunez—and from him to the plaintiff.

It appeared in evidence, that immediately after the making of the deed to Bodo Adams, he entered into possession of the lot on the south side of Government street, fenced it and built a small house on it, and continued in the occupancy for two or three years, when he abandoned it, and moved to Mississippi; and that on his removal, Kennedy entered into possession of it. That the lot sued for was not occupied by Adams, but remained vacant and unoccupied until after it was purchased by Henry. That in 1835 or '6, Henry put a fence round it, and immediately Kennedy tore it down and took the possession. That the defendant O'Brien had occupied the adjoining lot west of it for ten or fifteen years; and that three or four years ago, he was by Kennedy put in possession of the lot sued for, and had ever since continued in possession as the tenant of Kennedy.

The lot sued for was vacant until Henry attempted to take possession; that it was claimed by Kennedy, and also by Fouche and his assigns; that Fouche, by his agent, paid taxes on it while he claimed it. That Kennedy was in possession of the Price tract, of which this was a part. There was no proof that Kennedy's title to the Price tract had ever been confirmed by the government, and no proof of the payment by Adams, or any other person, of the purchase money, or the interest mentioned in the deed from Kennedy to Adams.

The court charged the jury, that the deed to Adams vested the right of possession in him, subject to be divested by failure of

payment; but that proof of non-payment of the interest must be made by Kennedy to sustain his right to enter upon the land. That if Kennedy entered peaceably and without objection from Adams, and without controversy, the law would presume he entered for breach of the condition. But if Henry, and those under whom he claimed, had possession of this particular lot ever since the deed to Adams until Kennedy took possession by force, the presumption did not arise, and that Henry could recover without proof of payment of principal or interest. To all which the defendant excepted; and which he now assigns as error.

The deed from Kennedy to Adams bears date the 12th January, 1822, and for the consideration of one thousand dollars payable three years after date, and secured by note, with legal interest, to be paid annually, conveys to Adams, with warranty in fee simple, "a square in the town of Mobile, bounded on the —— by Government street; on the east by Claiborne street; on the west by Franklin street, containing eight lots. And, also, the south half of that square, bounded on the east by Hamilton street; on the south by Lawrence street; on the north by the north half of said square; containing six lots, as will more fully appear by reference to the plan of the city, it being a part of a tract of land granted by the Spanish government to Thomas Price, by him conveyed to William E. Kennedy, and by him to myself; and I do hereby covenant, &c. Provided, nevertheless, if the said legal interest on the said note is not fully and entirely paid within thirty days after the annual time of payment; and provided, also, if the said sum of one thousand dollars, expressed in the said note, is not fully and entirely paid in three months after the time of payment, this deed to be void and of no effect in law or equity; and the said Kennedy, his heirs, &c., shall and may re-enter and re-possess the aforesaid premises, with all the improvements which may be made thereon, as in his former estate previous to the execution of this instrument. And it is further covenanted and agreed by and between the aforesaid parties, that the said consideration of one thousand dollars, in case the titles to the said lots is not confirmed by the government of the United States after the expiration of three years from this date, is not to be paid until the same is so confirmed; and in case the title to the same should not be confirmed, but be made void by the government of the United States, after the expiration of the said term of three

years, then, and in that case, the said Kennedy binds himself and his heirs to return the annual interest that may have been paid by the said Bodo Adams. In testimony whereof," &c.

STEWART, for the plaintiff in error, contended that the preliminary proof was not sufficient to authorize the introduction of secondary evidence of the contents of the deed; that it was not shown that the original was lost or mislaid; that a demise being laid from Adams, he was a plaintiff on the record, and his declaration, not under oath, was not evidence.

That the effect of Kennedy's deed was, that the interest was to be paid annually until the government declared the grant of the Price tract void; and that after the expiration of three years, he must pay the annual interest, or return the possession to Kennedy.

That the abandonment by Adams, and entry by Kennedy, reinvested him with the title; and that after such a lapse of time, it must be presumed that the entry was regular and for a breach of the condition. [2 Cain's Rep. 382; 6 Johns. 34.] That the present was not like the case where the lessor was endeavoring to establish a right to *re-enter;* that being in possession, the presumption arose, after such a lapse of time, that his entry was regular and justifiable, until the contrary was shown.

The court misled the jury by instructing it that Kennedy must prove that the interest was not paid to establish his right to enter; and in the instruction, that the presumption of a right to enter for a breach of the condition, did not arise, unless his entry was peaceable. As to misleading a jury by charging on matter not material, see 2 Ala. 359.

CAMPBELL, *contra.* To show that the preliminary proof was sufficient to authorize the secondary evidence, he cited 8 Porter, 536; 9 id. 39; 2 Ala. 58; 3 id. 452; 4 id. 158; 7 Pick. 12; 8 id. 390; 9 id. 23.

The deed from Kennedy to Adams conveyed an estate upon condition subsequent. Such conditions are not favored in law, and the estate is not divested without a breach of the condition, and an entry by the grantor; and the grantor who asserts the forfeiture, must prove the fact on which it depends, no matter how difficult it may be. [4 Kent's Com. 124; 2 Poth. on Ob. 126; 35

Eng. C. L. 458.] But in this case, the proof was easy, as the payment of the money was evidenced by a note, and its absence raises the presumption that the note was paid. [1 Ala. 736.]

As to the supposed acquiescence by Adams in the entry by Kennedy, no such presumption can be drawn; because it is in proof that he sold the lot in dispute, and could not, therefore, abandon his title to Kennedy.

ORMOND, J.—The preliminary proof was sufficient to authorize the introduction of the secondary evidence of the contents of the deed from Kennedy to Adams, as is fully shown by the cases heretofore decided by this court, and cited by the defendant's counsel. In addition, it is to be observed, that the deed is not exclusively a muniment of the title of Henry, as it covers fourteen lots of which he claims but one. It is, however, urged, that as a demise is laid from Adams, he is a plaintiff in the suit; and, therefore, his oath was necessary to prove the loss of the original. The practice of laying several demises is usually resorted to where there is a doubt under which the plaintiff may be able to prove title in the premises; but no doubt can ever exist as to who is the real plaintiff on the record. The demise itself being a fiction, and the one laid from Adams wholly unnecessary, as the title had long since passed from him, will not be permitted to interpose any difficulty. Henry is obviously the only real plaintiff on the record, although several demises from others were unnecessarily laid.

The true construction of the deed from Kennedy to Adams, is, that interest, as rent, was to be paid on the purchase money annually, as well after as before the expiration of the term of three years, within which time, it appears, the parties supposed the title would be either confirmed or made void by the government, unless before that time the title had been confirmed, in which event the interest would not be payable as rent after the expiration of the three years, the thousand dollars agreed to be given as the purchase money being then due.

This, then, was an estate in fee simple, which was to terminate upon the happening of a condition subsequent; but notwithstanding the condition was broken, the estate of the grantee was not divested until the grantor entered and defeated the estate. The counsel for the plaintiff in error contends, that such entry was

made in this case for a breach of the condition; and that the estate, previously granted, was thus re-vested in the grantor. To establish this breach of the condition and re-entry by the grantor, he relies on the statement of the evidence in the bill of exceptions: "That Adams went into possession of the lot on the south side of Government street, fenced it. and built a small house on it, and continued in the occupancy for two or three years, when he *abandoned* it, and went to Mississippi, where he still resides. That upon his removal from it, Kennedy entered into possession of it."

It has been already stated, that although the condition may have happened upon which the estate was to be forfeited, no forfeiture accrued until the grantor manifested his intention to claim the benefit of it by entering upon the land with the design of terminating the previous estate. An entry, therefore, for that purpose, must be such a notorious, unequivocal act as will demonstrate that intention. That such must be the character of an entry, is the express language of Blackstone is his 3d vol. 175: "The party entitled may make a formal, but peaceable entry thereon, *declaring* that thereby he takes possession; which notorious act of ownership is eqvivalent to a feodal investiture by the lord."

The tract conveyed by Kennedy to Adams, consited of fourteen lots of ground, eight of which lay on one side of Government street, and six on the other; the lots on the south being in his actual occupancy, and those on the other side of the street, where the *locus in quo* is situated, being then and for many years after, vacant.

What is meant by the expression in the bill of exceptions, that he *abandoned* his possession to it? The counsel for the plaintiff in error, contends, that it means that he gave up or yielded the title to all the lots. In our opinion, its fair interpretation is merely, that he left it, as we find in the next sentence, that the term "removed," is used as equivalent to the term abandoned, previously employed. The lots were separate and distinct from each other, and so considered by the grantor, as he refers to the plan of the city of Mobile for their boundaries; we cannot, therefore, understand the expression in the bill of exceptions, 'that he abandoned it," (the house he had built and occupied) to mean that he relinquished or yielded up his right and title to all the lots.

His conduct at or about the time, contradicts such a supposition.

He went into possession in April, 1818, and as stated in the bill of exceptions, remained in possession, "two or three years;" yet we find, that on the 12th January, 1822, he conveyed the lot in dispute to Antoine Fouche, which demonstrates that he did not consider that he had abandoned his title to that lot. But if this difficulty were surmounted, the fact that Kennedy went into possession of the house and lot when left or abandoned by Adams, is not an entry upon the other distinct and separate lots, which were then vacant, and had never been actually occupied by Adams.—The fee which was vested in Adams by the deed, could not be divested by such an equivocal act. To produce that result, there must have been such an assertion of title by Kennedy, as to place it beyond controversy, that he entered upon the lot as his own, for a breach of the condition. Whether his entry upon the lots on the south side of Government st., was sufficient to divest the title to those lots, is not a question now before us.

The cases of Jackson v. Stewart, [6 Johns. 34,] and of Jackson v. Demarest, [2 Caines, 381,] relied on by the counsel for the plaintiff in error, do not establish the proposition for which he cites them. They merely show, that where there is an abandonment of the possession by the lessee, and an entry and continued possession afterwards by the lessor, that after a great lapse of time, it will be presumed the lessor entered for non-payment of rent.—In Jackson v. Walsh, [6 Johnson, 226,] it was held that the lapse of nine years did not raise the presumption of a re-entry for the non-payment of rent. In this case, there is not only no proof of an entry on this lot, but the fact is shown to be, that Fouche, the purchaser from Adams, asserted title to it, and paid the taxes upon it.

The alleged entry of Kennedy being for a breach of the condition, it was necessary for him to establish his right to re-enter, by proving the non-payment of the rent. The general rule certainly is, that a party averring a negative, is not bound to prove it, but the proof must come from him who asserts the affirmative, and within whose knowledge it peculiarly lies. But the rule does not apply to such cases as the present, because the estate is vested by the deed, and he who asserts that it is forfeited, must prove it. In Doe v. Whitehead, [8 Adol. & E. 571,] which was ejectment for an alleged forfeiture of a lease, for omitting to insure which, by the terms of the lease, was to be a forfeiture, the

court held that the landlord must prove that insurance had not been made. That the estate was vested in the lessee, and could only be got rid of by proving a forfeiture—that the difficulty of the proof did not vary the rule of law.

Doubtless, in such cases, slight proof would be sufficient *prima facie*, and in this case, would not have been difficult, as the production of the note, which it appears from the deed was executed co-temporaneously with it, would have been sufficient to raise the presumption of a breach of the condition.

It was, however, urged, that although the law might be so when the grantor was suing to obtain the possession, that the rule did not obtain when he was in possession, and suit brought against him. Doubtless, a long possession by the grantor, acquiesced in by the grantee, might be sufficient to raise the presumption, that the original entry was for a breach of the condition, but in this case, the only entry of Kennedy proved, upon this lot, is a forcible possession taken of it from the plaintiff in 1835 or 1836, and there can be no difference in the rule of law, between his defending himself against such a forcible taking, or suing to obtain the possession. A man cannot by his own wrongful act, charge the rules of law, and diminish quantity or change the quality of the evidence necessary to sustain his claim.

From the view which we have taken of the case, it results, that the charge of the court was substantially correct, and its judgment is therefore affirmed.

FARR & SIMPSON v. THE STATE.

1. Where recognizors are bound in several sums in one recognizance, and several judgments are rendered against them, they cannot join in the prosecution of a writ of error; but where a joint writ is sued out by them, it may be amended under the act of 1843 "to authorize the amendments of writs of error," by striking out one of their names, and then it will remove the cause as to the other.

2. The judgment upon a recognizance should show that the party charged with an offence, was required to answer the charge specified therein.

WRIT of error to the Circuit Court of Shelby.

Farr being arrested upon a *capias* to answer to an indictment for larceny, entered into a recognizance with Simpson as his surety, conditioned for his appearance at the next succeeding term of the court, and to answer accordingly. Farr having failed to appear, a judgment on the recognizance was entered, reciting "that the defendant being solemnly called to come into court, came not, but wholly made default. It is, therefore, considered by the court, that the State of Alabama recover of the defendant, William Farr, and James A. Simpson, his security, in his recognizance, each the sum of two hundred dollars, for such the default of the said defendant, unless the said defendant, Farr, shall, upon *scire facias*, informing him hereof, appear at the next term of this court, and show good cause for his non-attendance at this term, &c.". Upon a *scire facias* being made known to the recognizors, they appeared and pleaded *nul tiel record;* and the court being of opinion that both the recognizance and judgment *nisi* were sufficient, rendered a final judgment against each of the defendants for the sum of two hundred dollars and costs.

E. W. PECK, for the plaintiffs in error.
ATTORNEY GENERAL, for the State.

COLLIER, C. J.—The attorney general has moved to dismiss the writ of error in this case, because the final judgment against the defendants is several, and they cannot, consequently, join in a proceeding for its revision. In Howie & Morrison v. The State, [1 Ala. Rep. N. S. 113,] this court said, that where there are several judgments against two or more recognizors, although contained in the same entry, neither of them have any interest or concern with the judgment against the other; and they cannot, therefore, join in the prosecution of the writ of error.—The case cited, is directly in point, and the writ of error would be dismissed, but for the act of 1843, "to authorize the amendment of writs of error," which has been subsequently passed.—By the first section of that statute, it is enacted that "all writs of

error wherein there shall be any variance from the original record, either in the name or the number of the parties, the form of the action, or other defect, may and shall be amended, and made agreeable to such record, by the respective courts, where such writ or writs of error shall be made returnable, under such rules and regulations as the supreme court may prescribe." [Clay's Dig. 312, § 39.]

In the case at bar, there is no variance in the writ of error from the record, &c. yet it is defective in embracing two distinct judgments. With a view to prevent its dismissal *in toto*, the counsel for the plaintiffs in error, proposes to amend it by striking out the name of Farr and removing the record and judgment as to Simpson alone. We think the very beneficial statute which has been noticed, embraces in its spirit and intention, such a state of case, and that the amendment must be allowed.

In Howie & Morrison v. The State, *ut supra*, it was said to be essential that the record should should show that the accused was required to answer the charge specified in the recognizance; this, it was supposed, was necessary to show a breach of the recognizance: *Further*, that if suit were instituted upon the recogzance, such an allegation would be necessary to show a breach of its condition; and as much certainty was necessary in a judgment *nisi*, as in stating the breach in an action of debt. The principle thus laid down, applies with all force to the case before us; for it is not stated for what cause the appearance of Farr was required. And the judgment *nisi* being defective, the subsequent proceedings which depend upon it for their regularity, cannot be sustained.

This view is conclusive of the case, and shows that the judgment of the circuit court must be reversed, and the cause remanded.

MORRISON, GIVHAN, ET AL. v. MARVIN.

1. A surety, after paying the amount of the execution issued against the principal and other sureties, as well as himself, is not entitled to have the execution kept alone for his own benefit, either against the principal or co-sureties.

WRIT of error to the Circuit Court of Lowndes.

A motion was submitted on behalf of Morrison and five other defendants, against whom, together with Marvin, an execution had issued at the suit of Whipple & Howard, for a rule upon the sheriff, to show cause why he should not produce the execution issued on this case, and make his return on the same, according as the facts were.

Notice of the motion having been given to all the parties, the sheriff appeared in court and produced the execution; Marvin appeared by counsel, and resisted the motion. The following facts were then proved to the satisfaction of the court. The debt on which the execution was founded, was a note made by Morrison as principal, and George Givhan as surety, on this judgment was obtained against both, in the circuit court; the other parties became connected with this judgment by signing a writ of error bond at the request of Givhan, by means of which, the judgment was superseded, and after affirmance in the supreme court against all the parties, execution was issued and placed in the sheriff's hands for collection. Ebenezer Marvin then paid the sheriff an account of George C. Marvin, the amount of the execution, with all costs, and requested the sheriff not to return it satisfied, but to leave it open for the benefit of the said George C. Marvin, for whose account it was paid. An alias execution was afterwards issued, and levied on lands belonging to Philip and Jacob Givhan, two of the other defendants; George Givhan promised to indemnify Marvin against all loss from the cause, at the time when the request was made for him to sign the writ of error bond.

On this state of facts, the court ordered that the execution should be returned satisfied as to all the parties except Morrison and George Givhan, but as to them, that it should be left open for the benefit of Marvin; also, that execution might issue against

them for his benefit. The defendants excepted to this action of the court, and it is now assigned, that the judgment entered to that effect, is erroneous.

R. Saffold, for the plaintiff in error—cited Foster v. Athenaeum, 3 Ala. Reports, 302; 1 Story's Eq. 477, and cases there cited.

No counsel appeared for Marvin.

GOLDTHWAITE, J.—It appears from the investigation of facts upon the motion for the rule against the sheriff in this case, that one of the sureties on the writ of error bond, and against whom the judgment was affirmed, had paid to the sheriff the amount of the judgment and costs, upon an execution issued on the affirmed judgment. This was in law, a complete satisfaction of the judgment, and the sheriff ought to have returned the execution satisfied. The surety is not entitled to keep the execution open for his indemnity upon paying the money. [1 Story's Eq. 477; Foster v. The Athenaeum, 3 Ala. Rep. 392, and cases there cited.

The judgment of the circuit court on this motion must be reversed, and the cause remanded for such proceedings as may be in accordance with law.

STEELE v. DART & CO.

1. A son wrote to the creditors of his father, promising to pay a debt his father owed, stating that his father had made provision for it, and concluded by saying "I am the agent for the trustees, and am determined the debt shall be paid forthwith." *Held*, that this was not an absolute promise to pay the debts. That if he was responsible upon the promise, it was in his character of agent, when the question would be whether he had authority from the trustees to make the promise.
2. A deposition in the hand writing of the party taking it, cannot be read in evidence unless the opposite party was present consenting thereto.

ERROR to the Circuit Court of Jefferson.

Assumpsit by the defendants against the plaintiff in error.

The action was brought on a written promise by the defendant to the plaintiffs to pay the debt of the defendant's father.

The promise relied on was made by letter, and is as follows: after stating that his father, in consequence of some misconduct, had been compelled to fly the country, but had left plenty to pay off all demands, the writer proceeds:

"I would like if you would sue on the claim you hold on Steele & Adkins, as the concern of Steele & Adkins, or the property belonging to Steele & Adkins as joint property, is insufficient to pay the demands against them; and if you will sue, the law will compel Adkins to pay his half. The claim you hold against Steele & Allen for some $800, will be paid by me soon, as there was a provision made for it. I may not pay it until next spring, at which time I expect to be in your city, and at that time hope to arrange business satisfactorily. Should you send Steele & Atkins' note south for collection, which I have no doubt you will soon, I would advise to address it to Crabb & Cochran, &c. I am the agent for the trustee, and I am determined the debts shall be paid forthwith.

Your friend, SYLVESTER STEELE.

N. & J. DART & Co."

The defendant, to prove his infancy, offered the deposition of a witness, to the reading of which the plaintiff objected, because it was in the hand writing of the defendant, except the signature of the witness and commissioners. The court sustained the objection, and the deposition was excluded.

The court charged the jury, that the letter of the defendant was an absolute promise to pay the debt described therein of Steele and Allen; and if the jury should find from the evidence that the promise was made upon a consideration, either of a valuable thing received by the defendant, or forbearance by the plaintiffs to sue the original debtors, it was a valid promise in law, and the defendant was bound by it, unless he had satisfied the jury he was under twenty-one years of age at the time he made the promise.

The defendant excepted to the exclusion of the deposition, and to the charge of the court; and now assigns the same as error.

MARTIN & HUNTINGTON, for plaintiff in error, cited 2 Marshall, 72; Minor, 136.

MUDD, *contra*, cited 2 B. Monroe, 302; 2 Greenleaf, 408; 5 N. H. 94; 2 Haywood, 305.

ORMOND, J.—The deposition being shown to be in the hand-writing of the defendant, was properly excluded. There would be no security for suitors in our courts, if the evidence was permitted to be written down by a party to the suit, the opposite party not being present and consenting thereto.

The evidence taken by deposition, is most usually *ex parte*, and requires all the guards which can be thrown around it to secure it against imposition and unfairness. In the case of an ignorant or willing witness, a party to the suit could shape the testimony to suit his own purposes; and we are clear in the opinion, that the deposition was properly rejected.

As it regards the promise made by the defendant, my own opinion is, that it is an absolute promise to pay the debt, though I admit the question is not entirely free from difficulty. My brothers think that the concluding sentence of the letter, in which the defendant says that he is the "agent of the trustees," shows that he did not intend to bind himself individually, but that he merely intended to state, that having the control, as agent of the trustees, of the means provided by his father for the payment of his debts, he would be enabled to discharge the debts; and that if he is responsible upon his promise individually, it must be in his character of agent, when the question would be whether he had authority to make the promise on behalf of the trustees. I rather incline to the opinion that the true meaning of the letter is, that he intended to bind himself individually to pay the debt, and discloses the fact, that he was the agent of the trustees, and as such, had possession of the funds to assure the plaintiffs that he, although a mere youth, as he appears to have been, had the ability to comply with it.

Let the judgment be reversed, and the cause remanded.

MALLORY v. STODDER.

1. A deed conveying the title to lands, is operative against the creditors of, or a subsequent purchaser or mortgagee, &c. from the grantor, from the time of its registration only, where it was not recorded within the time prescribed by the statute.
2. At the time the creditor signed and sealed a deed of trust made for his benefit, there was a blank left for the description of the property (to which his debtor, the grantor had not then a legal title,) with the understanding that it was to be filled up; if the grantor perfected his title, executed and acknowledged it, and it was duly recorded, the deed from that time became operative in favor of the *cestui que trust.*
3. The assent of the grantee to a deed *beneficial to him*, will be presumed, although it may be recorded without having been executed by him
4. Where the grantor of lands has the evidence of a legal title and is in possession, his grantee cannot be affected by any notice which the former had, of an unregistered deed to a third person from the vendor of the grantor.
5. A bill of exceptions must always be taken most strongly against the party excepting; and where it states facts which show that a person had a considerable length of time, previously become the purchaser of land, and his right to occupy it was during all that time undisputed, it will be intended against the party excepting and in favor of his adversary, that the purchaser was in possession.
6. The cancellation of a deed to land will not revest the title in the grantor, but the vendee delivers up his unregistered deed to be cancelled, he places it in the power of the latter either to sell or incumber the land; and a *bona fide* purchaser or incumbrancer without notice, would have the paramount interest; and this, although he did not acquire it directly from the vendor; but from one to whom the vendee delivered the deed under a parol contract for a sale, that he might exchange it with the vendor for a deed made directly to himself.

WRIT of error to the Circuit Court of Jefferson.

This was an action of trespass, at the suit of the defendant in error, brought as well to try titles and recover the possession of certain tracts of land situate in the county of Jefferson, and particularly described in the declaration, as to recover damages for their occupancy. The cause was tried on the plea of "not guilty," and a verdict returned for the plaintiff, on which judgment was rendered. To reverse that judgment, a writ of error has been sued to this court.

On the trial, the defendant excepted to the ruling of the circuit judge. It appears from the bill of exceptions, that both the plaintiff and defendant claim title under Richard Rockett, who was once the owner of the land. Mallory deduced title under a deed from Rockett to him, dated on the 21st of May, 1837, which was recorded in the office of the clerk of the county court on the 2d of March, 1840.

The plaintiff proved by one Baker that he had originally purchased the land from Rockett, and sold the same to Mallory, to whom the deed was made at his (Baker's) request It was further stated by the witness, that he afterwards purchased the land of the defendant for one thousand dollars; a part of which defendant owed him, and the remainder, from four to six hundred dollars, witness was to discharge by paying a debt amounting to that sum which defendant owed the bank The promise to pay this debt was made verbally. Upon this contract being made, Mallory delivered up to witness Rockett's deed, stating to him, that he could either have his name stricken out and witness' inserted, or he could return the deed to Rockett, and take another to the witness. Witness did not understand that there was any condition annexed to the surrender of the deed; he was then solvent, and he supposed the defendant was willing to trust him to pay the Bank debt.

A deed from Rockett to Baker, dated 10th of January, 1839, was introduced, proved and read in evidence, but it was never recorded. Baker testified that this deed was executed by Rockett after he had received from Mallory the deed to him (Mallory); and as well as he recollected, after he had surrendered the same to Rockett. Witness further testified, that after the registration of the deed of trust to Norris, Stodder & Co., which was executed as hereinafter stated, he obtained the deed from Rockett, which he (witness) had before surrendered, and returned it to Mallory, who then had the same recorded.

The deed of trust from Baker to a trustee for the benefit of Norris, Stodder & Co., was produced, proved and read to the jury. This deed was dated the 19th of February, 1839, and duly recorded in the office of the clerk of the county court on the 27th of the same month. Baker testified that this deed was executed in Mobile by N., S. & Co. before the property in question was described in it, and with a blank left for that purpose; and

before Rockett made the deed to the witness as stated above. Witness did not recollect v hether he executed the deed in trust before it was completed, and whether before or after he received the conveyance from Rockett; but the acknowledgment by him and its registration were after the same were filled up and signed, and after Rockett conveyed to him. Witness further stated, that the deed in trust was executed in good faith to secure the payment of a debt which he owed the beneficiaries therein. The lands in question were sold under the trust deed, and purchased by the plaintiff for the sum of ten dollars, (which was insufficient to defray the expenses of the sale,) and he received a conveyance for the same from the trustee on the 4th of May, 1840.—Baker was informed of the conveyance from Rockett to Mallory, but there was no proof that N., S. & Co. were advised of it.

Although there was some conflict on the point, yet there was evidence tending to prove that the debt due to N., S. & Co. was contracted simultaneously with the execution of the trust deed. This debt had been collected since the sale of the land by suits against Baker and certain persons who were his sureties for its payment.

1. The court charged the jury, that if Mallory failed to have his deed recorded within six months from the time of its execution, it was void as to *bona fide* creditors and purchasers without notice; and its subsequent registration would only operate a notice from the time it was registered.

2. That if Baker knew of the deed to Mallory, and it was existing at the time of Rocket's deed to Baker, he would not be a purchaser without notice. But if Baker in good faith conveyed the land in trust to secure a debt to N., S. & Co. created at the time of making the conveyance, then the latter would be *bona fide* mortgagees for a valuable consideration, within the statute, and would not be affected by the deed to Mallory; unless they knew of its existence, or it was recorded. And that a fair purchaser at a regular sale under the trust deed would also be protected. If N., S. & Co. were creditors of Baker for a debt previously contracted, then they would not be regarded as mortgagees for a valuable consideration; but would take no greater interest in the land Baker had, and would be affected by a notice to him.

3. That if Mallory gave up his deed to Baker unconditially,

and authorized Baker to return the deed to Rockett to be cancelled and to procure a deed to himself; and if Baker, pursuant to that authority, did return the deed to Rockett, and while it was in the possession of the latter, he (Baker) obtained a deed from him, Baker's title would be a good one, and Mallory's claim would be lost, if all this took place before his (Mallory's) deed was recorded.

4. Defendant's counsel prayed the court to charge the jury, that if the debt to N., S. & Co. was secured by personal security, then they could not be regarded as mortgagees for a valuable consideration within the statute, and would take no greater interest than Baker himself had. In answer to this prayer, the court instructed the jury, that if they should find that the trust deed was made to secure a pre-existing debt, then the effect of personal security would be such as the charge prayed, supposed; but it would have no effect upon the right of the *cestui que trust* if the debt was contracted simultaneously with the execution of the deed.

P. Martin & Huntington, for the plaintiff in error, made the following points:

1. That the delivery of the deed by Mallory to Baker and its surrender to Rockett did not divest the title of the former; and this although the deed to Mallory was not recorded; for these several parties had notice of it. [Jackson v. Page, 4 Wend. Rep. 585; Jackson v. Anderson, 4 Wend. Rep. 474; Jackson v. Stevens, 16 Johns. Rep. 110]

2. Rockett in making the deed to Baker, acted under a parol authority from Mallory. A power to convey lands must be created by deed, and Rockett not being thus authorized, his conveyance to Baker did not pass the title as against his previous grantee. [Reed v. Van Ostrand, 1 Wend. Rep. 424. See 4 Wend. 474, *supra.*]

3. The omission to register Mallory's deed cannot be taken advantage of by Baker or those claiming under him (Baker); because he had notice of it. [Jackson v. Page, *supra;* Jackson v. Post, 9 Cow. Rep. 120; Jackson v. Given, 8 Johns. Rep. 137.]

4. The deed in trust being executed before Baker obtained the deed from Rockett, it was void, even if the latter was so invested with the title that his coveyance would be operative.

W. S. Mudd, for the defendant.—1. The first charge of the court is abstract, at least so far as relates to creditors without notice. The contest is between Mallory and a *bona fide* purchaser without notice, and as applicable to such a case, the charge is unexceptionable. [Clay's Dig. 154, § 18.]

2. The law of the second charge is correctly stated, and the questions of fact relating to the *bona fides* of the dealings between Baker and N., S. & Co., and whether the latter were informed of the existence of the deed to Mallory are correctly referred to the jury

3. The third charge, if not altogether abstract, was wholly unnecessary as applied to this case. It is important whether the deed to Mallory was delivered up to Rockett for cancellation; no matter what was done with it, if it was not recorded so as to operate a notice to N., S. & Co. If the contest had been between Baker and Mallory, the question of cancellation might be important.

4. A cancellation of the deed in acontroversy between the parties, it may be conceded, does not divest the grantee's title, if he retains possession. But the rule is otherwise, where a third person claims as a *bona fide* purchaser for a valuable consideration without notice. [Dudley v. Commonwealth, 10 Mass. Rep. 403; Bartlett v. Thorndike, 1 Greenl. Rep. 78; Holbrook v. Tirrell, 9 Pick. Rep. 105.]

COLLIER, C. J.—The act of 1823, enacts, that any deed or conveyance of land, &c. shall be void, and of no effect against a subsequent *bona fide* purchaser, or mortgagee for a valuable consideration without notice, unless the same shall be duly acknowledged or proved and certified, and lodged within six months after its execution and delivery, with the clerk of the county court of the county in which the lands, &c. are situated, for registration. [Clay's Dig. 154, § 18.] This provision is substantially re-enacted by the act of 1828, which also makes registration necessary as against creditors and purchasers, and declares, that "all deeds recorded after the expiration of six months shall be valid and operative from the date of their registration as to creditors and subsequent purchasers: *Provided*, that the same shall be valid at all times between the contracting parties thereto. [Clay's Dig. 256, § 8.]

The deed from Rocket to Mallory, can only operate against a creditor, or subsequent purchaser or mortgagee without notice, from the time it was deposited with the clerk of the county court to be recorded. If then, Messrs Norris, Stodder & Co. can be regarded in either of these characters, the conveyance under which the defendant claims can only be effectual as to them, from the second of March, 1840, when it was registered.

The fact that the deed of trust was executed in Mobile, while it was in an incomplete state, can make no difference as it respects its legal effect. That execution would be a nugatory act, and the deed would become operative from the time the grantor inserted therein, a description of the land, and acknowledged the same with a view to its registration. Before this was done, he obtained the conveyance from Rockett, according to the contract between Mallory and himself; and so far as the evidence of a legal title was necessary, he had it.

But the proof does not show that Baker did sign the deed of trust until after it was perfected, in point of form, and he had actually obtained the conveyance from Rockett. As for its execution by the trustee or *cestuis que trust*, while it was a mere blank, that is wholly unimportant. It was not necessary that they should have signed it, before it was recorded; for if the trustee had even refused to act, chancery could provide for its execution by supplying his place with a substitute; and as for the beneficiaries, their assent will be presumed, as the deed was intended for their security, without requiring the payment of an additional sum, and was *prima facie* beneficial. But if an execution by the latter were necessary, their subsequent assent to what they had previously done ineffectually, would be sufficient.

At the time then, that the deed was executed for the benefit of Norris, Stodder & Co., Baker had in his possession a formal conveyance of the title, and the deed set up by the defendant, though executed near two years previously, had never been recorded. This, it is contended, cannot prejudice its operation as against the plaintiff; for even conceding that Norris, Stodder & Co. were *bona fide* purchasers, or incumbrances, for a valuable consideration, yet they would be affected by the notice which Baker had of defendant's title. This question arose in Fenno, et al. v. Sayre & Converse, [3 Ala. Rep, 475.] There, this court said, where one acquires an interest in land, in good faith, and for a

valuable consideration, if his grantor was invested, with a legal title, evidenced by the usual writings, was himself in possession, and there was no such registry of an incumbrance as was constructive notice of its existence, he cannot be defeated by showing the invalidity of the title under which he claims. It was also said that a derivative purchaser without notice, cannot be affected by a notice to his immediate vendor, and although he purchase with notice, he may protect himself by the want of it in the latter.—Sugden, in his Treatise on Vendors, [p. 471,] thus lays down the law, "although a deed be merely voluntary or fraudulent in its creation, and voidable by a purchaser, viz: (would become void by a person purchasing the estate) yet it may become good by matter *ex post facto;* as if a man make a feoffment by covin, or without any valuable consideration, and then the first feoffer enter and make a feoffment for a valuable consideration; the feoffee of the first feoffee, shall hold the lands and not the feoffee of the first feoffor; for although the estate of the first feoffee, was in its creation, covinous or voluntary, and therefore voidable, yet when he enfeoffed a person for valuable consideration, such person shall be preferred before the last." In the case cited from our own reports, many English and American decisions are referred to, which establish the principle that "a purchaser without notice from a fraudulent purchaser, is not affected by the fraud." [See them at pages, 475–6.]

A bill of exceptions must always be taken most strongly against the party excepting; for the reason that it is supposed to be prepared by his counsel, who has stated the facts as favorably as truth will permit, to the side he represents. In the case before us, it does not expressly appear whether Baker or Mallory was in possession of the land at the time the deed of trust was made to Norris, Stodder & Co. But it is inferrable under the rule stated, that the former was in possession; the more especially as the latter had sold him the land, delivered his deed to be returned to Rockett, and received another to himself directly. This being the case, and the records of the county court showing nothing as to the state of the title between Baker and Mallory, the beneficiaries in the trust deed are not chargeable with a notice of any claim set up by the latter. In point of fact, he claimed no interest at the time of its execution, whatever might be the legal effect of the

deed he had delivered up for cancellation, as between those who had notice of it.

The view we have taken, proceeds upon the supposition, that the deed to Mallory was not cancelled or annulled by the agreement between Baker and himself, but was entitled to the effect which the law accords to unregistered deeds. In Barrett v. Thorndike, [1 Greenl. Rep. 78,] the court said they knew of two methods only, in which the grantee of lands could voluntarily divest himself of the estate which had vested in him by a conveyance; these were by a *re-conveyance* or a *will*. But they said, if the deed was not recorded, he might restore it to the grantor; and if this were done fairly, and without impairing or intending to impair the rights of third persons, the transaction would be effectual as between the parties, to revest the estate.

In Holbrook v. Tirrell, [9 Pick. Rep. 105,] the effect of the cancellation of a deed upon the title to real estate, was elaborately discussed at the bar. The court said, "that the mere cancellation of the deed under which one holds title to real estate, does not divest the title or revest it in the grantor, seems to be abundantly settled by the cases cited on the argument, and more particularly by two cases to which we have since been referred by the petitioner's counsel, namely, 4 Conn. Rep. 550; 5 id. 262."—*Further*, that by the deed to the grantee, which was not recorded, the title vested in him as against the grantor and his heirs, but was so far left in the latter, that a conveyance from him to another person, ignorant of the former deed, would pass the estate; and a creditor of the grantor might have acquired a title by a levy upon the land as his. The case cited is directly in point to show, that by the delivery of Mallory's deed to Rockett, it was placed in the power of the latter, either to sell absolutely, or incumber the land in question, and that a *bona fide* purchaser or incumbrancer, without notice, would have an interest paramount to Mallory. Now, although Norris, Stodder & Co. did not receive their deed directly from Rockett, yet we have seen that they are to be regarded with quite as much favor as if they did; and having no notice themselves of the previous conveyance to Mallory, they are unaffected by a notice to Baker.

It is needless to examine with particularity, the charges given, or prayed to be given to the jury; if in giving or refusing them, the court erred, the view we have taken of the law, will show,

that the error, if any; was beneficial for the defendant; and he cannot be allowed to avail himself of it here. The consequence is, that the judgment of the circuit court is affirmed.

CLARK v. BOGGS, USE, &c.

1. A justice of the peace having collected money, is subject to garnishee process, and the service of such upon him is a sufficient excuse for the omission to pay over the money to the person for whom it was collected, and is consequently a bar to the damages allowed by statute.

WRIT of error to the Circuit Court of Barbour.

This was a motion made under the statute, by Boggs, before a justice of the peace, against Clark, for having failed to pay over monies collected by him as a justice of the peace. The suit was removed in the circuit court by appeal, and there the facts were submitted for judgment, without the intervention of a jury.

The facts were, that Clark, as a justice of the peace, had collected a small sum of money for the plaintiff, and refused to pay it over, on account of having been garnisheed to pay it to another person. The plaintiff insisted that Clark was responsible for the sum so collected, with ten per cent. per month damages, from the time of demand made. The court gave judgment for the money collected, with interest upon it, but refused to allow judgment for the penalty, on the ground, that the garnishment was a reasonable excuse for refusing to pay it over. The plaintiff excepted to this refusal of the court to allow the damages; and this is the only error assigned.

JOHN A. CALHOUN, for the plaintiff in error—insisted that the circuit court had no discretion to withhold the damages. Under the statute, [Clay's Dig. 362,] no discretion is given, and

therefore, it was the duty of the court to allow the damages, as it determined the defendant was in default.

SAYRE, *contra*—argued that no judgment whatever, should have been rendered under the circumstances in proof. A justice of the peace, when money is collected by him, holds it as the mere agent of the party, and is as much liable to garnishee process, as any other agent. [People v. Whaley, 6 Cowen, 661.]

GOLDTHWAITE, J.—A justice of the peace is not merely a judicial officer with relation to the collection of small debts, &c.; but is also the agent of the person who intrusts their collection with him. As soon as the money is collected, his character as a magistrate ceases, and he holds it as any other agent. The sheriff is the officer of the court, whose process he executes, and public policy forbids that he should be drawn into any litigation with respect to the money collected on it before any other tribunal; and therefore, there is little analogy between his responsibilities and those of a justice of the peace. As a justice of the peace is nothing more than an agent, with relation to him whose money has been collected, he is within the scope of the statutes permitting garnishee process, and is required to answer as any other person, being liable to that process, it results that it affords a sufficient excuse for the omission to pay over money collected by him. In the present case, it is not expressly stated in the record, that he was discharged by the court, before which he was summoned, but we infer such was the fact, from the circumstance that judgment was rendered against him for the sum collected.

Our conclusion is, that there is no error in the point excepted to, and the judgment is affirmed.

PETTUS v. ROBERTS.

1. P. exchanged two female slaves with R. for a negro man, and gave him a receipt acknowledging to have received from him $850 for the two slaves, which he warranted to be sound. Afterwards, R. insisting that one of the slaves was unsound, offered to rescind the contract, which P. agreed to if R. would receive back the negro man, which he refused, and demanded the $850. R. having brought an action against P. on the warranty,—*Held* 1. That the receipt was open to explanation by parol proof showing what the contract really was. 2. That P. had the right to return the slave he had received, when the recission was demanded, and that upon his failure to do so, the measure of damages would be the value of the slave at the time he received him, unless at the time of the exchange the parties estimated his value. 3. It was not necessary to a rescision that the plaintiff should offer to return the bill of sale.

Error to the Circuit Court of Sumter.

Assumpsit on a false warranty in the sale of two slaves.

Upon the trial, the plaintiff introduced in evidence the following instrument:

"Received of John Roberts eight hundred and fifty dollars, in full for two negroes—Caroline, aged twenty-seven, and her daughter Aggy, about nine. I warrant the title good and the property sound. A. W. Pettus.

January 10th, 1842."

It was in proof, that the plaintiff, some time after the date of the writing, tendered to the defendant the said slaves, and demanded eight hundred and fifty dollars. The defendant then offered to prove that the consideration was not eight hundred and fifty dollars, but a negro man named Alfred; and that he offered, when the demand was made, to return said negro man, but the court refused to permit the evidence to go to the jury. There was no proof of an offer to return the bill of sale.

The defendant moved the court to charge, that in order to a rescision, it was necessary for the plaintiff to show that he had offered to return the bill of sale; also, that if the plaintiff had the negroes in possession since the offer to return, and that their services was worth as much as the interest on the purchase money,

they might refuse to allow interest: which charges the court refused to give; and to which the defendant excepted.

Judgment being rendered for the plaintiff, the defendant prosecutes this writ, and assigns for error the rejection of the evidence, and the refusals to charge, as shown in the bill of exceptions.

Bliss & Baldwin, for plaintiff in error, insisted, that this was a mere receipt, and as such, might be contradicted or explained. They cited Greenleaf's Ev. § 285, 305; 16 Wend. 460, 4 N. H. 229; 7 Pick. 553; 5 Ala. 224; id. 430.

J. B. Clarke and Metcalfe, *contra*, argued, that although the bill of sale might be explained by showing a consideration smaller than that stated in it, it could not be contradicted by showing a different consideration. [5 Porter, 498.]

That the consideration inserted in the bill, was the price agreed to be given for the slave Alfred, and was, therefore, binding on the parties. [4 Esp. 95; 2 Stew. 498; 9 East, 349.] To show that that the plaintiff was entitled to interest, they cited 5 Wend. 535.

ORMOND, J.—The principal question in the cause is, whether the defendant could show, in mitigation of damages, that the true consideration of the receipt was not "eight hundred and fifty dollars," but that it was a negro slave by the name of Alfred.—The importance of this testimony to the rights of the defendant is apparent. The suit is on a false warranty in the sale of two slaves, for whom, it appears by the receipt, eight hundred and fifty dollars were paid. The plaintiff offered to rescind the contract, alleging the slaves to be unsound, and demanding the sum of money specified in the receipt. The defendant was willing to rescind if the plaintiff would receive the negro Alfred, who, instead of the money expressed in the receipt, was the true consideration of the sale, or exchange, as, in truth, it appears to have been. And as in justice the plaintiff had no right to demand a larger or different consideration than that paid by him on the purchase of the slaves, upon a rescision of the contract, such proof should be permitted to be made, unless forbidden by some strict rule of law.

That a written instrument cannot be varied or contradicted by

parol testimony, is a familiar rule of evidence daily acted on in courts of justice, and of most beneficial tendency. Receipts have been long considered as an admitted exception to the rule. They are considered as admissions, and may be contradicted, varied or explained by parol testimony. The question, whether the recital of the consideration in a deed stood upon the same footing, and to what extent it was open to explanation has long been a vexed question. This question was considered by this court in Mead v. Steger, [5 Porter, 498,] and it was there held, as the result of the cases, that where a moneyed consideration was expressed in a deed, it might be shown to be greater or less than stated; but that a different consideration could not be proved.—In Saunders v. Hendrix, [5 Ala. 224,] we held that an acknowledgment in the body of the deed that the consideration money was paid, was a receipt for money merely, and open to explanation by parol proof as any other receipt for money.

In McCrea v. Purmort, [16 Wendell, 466,] it was held by the court, after an elaborate examination of all the cases, English and American, that the consideration clause in a deed was as open to explanation as an ordinary receipt, and that the party was only estopped by such an admission from denying there was a sufficient consideration to pass the estate granted. And, accordingly, it was held in that case, permissible to show that the consideration expressed in the deed was not money, but iron, of a specified quantity, valued at a stipulated price.

The receipt in this case not being under seal, the case is free from the embarrassment created by the supposed estoppel, where the instrument in which the admission is made, is a deed. It is both in form and substance, a mere receipt, and we are clear, that no obstacle exists to the establishment, by parol proof, of the real consideration. From the proof, it appears that the contract between the parties was an exchange of the two slaves, mentioned in the receipt or bill of sale, for a negro man by the name of Alfred, and the defendant had the clear right, upon a rescision of the contract, to return the slave which he had so received in exchange; and upon a failure to return the slave, the measure of damages would be the value agreed upon by the parties, at the time of the exchange, if an estimate of the value was then made and agreed on. If no such estimate was made, then the measure of damages would be the actual value of the boy given by

the plaintiffs in exchange at the time the transaction took place.

The jury were not bound to allow interest on the purchase money to the plaintiff, and might, if the facts in proof justified it, take into consideration the value of the services of the slaves in possession of the plaintiff, in their estimate of damages.

It was not necessary to a rescission of the contract, that the plaintiff should have offered to return the bill of sale, as the rescission would have deprived it of any legal effect, and it would have become mere waste paper.

Let the judgment be reversed, and the cause remanded.

THE BANK OF THE STATE OF ALABAMA v. GIBSON'S ADM'RS.

1. The State Bank is a mere corporation, not invested with the attributes of sovereignty, and like an ordinary creditor must cause a claim, of which it is the proprietor, to be presented to the administrator of a deceased debtor, within eighteen months after the grant of administration.

WRIT of error to the County Court of Dallas.

This was an action of assumpsit at the suit of the plaintiff in error against the defendants on a promissory note, payable to the president and directors of the Bank of the State of Alabama.—The defendants pleaded, 1. That the cause of action described in the plaintiff's declaration, was not presented to them within eighteen months after letters of administration on the estate of the intestate were granted to them; nor within eighteen months after the same accrued. 2. *Plene administravit.* 3. *Non-assumpsit.* To the first plea, the plaintiff demurred; to the second, there was a replication, and on the third, issue was joined. The demurrer was sustained, and the plaintiff declining to reply, a judgment was rendered in favor of the defendants for costs.

C. G. EDWARDS, for the plaintiff in error—insisted that the

first plea set up what was commonly called the statute of non-claim; and in legal effect, it was a statute of limitations. [Thrash v. Sumwalt, 5 Ala. Rep.; Clay's Dig. 195, § 17; 2 Mason's Reports, 311.]

The State is not bound by any of the statutes, which operate against creditors and other suitors. *Nullum tempus occurrit reipublicae* has been frequently recognized in our sister States.—[4 Bibb's Rep, 554; 18 Johns. Rep. 227; 1 Hen. & Munf. Rep. 85; 4 id. 65; 3 Serg't & Rawles' Rep. 188; 4 Mass. Rep. 528; 6 T. Rep. 188; 1 Bla. Com. 247; 1 Coke's Lit. 74; 5 Bac. Ab. 559, 561, 562.]

Although the Bank is the nominal plaintiff, the State is the real party in interest; and the statute of limitations could be no more interposed, than if the State was the plaintiff of record. [Clay's Dig. 77; 1 Scammon's Rep, 106.]

G. W. Gayle, for the defendant—was proceeding to argue the two first points made by the counsel for the plaintiff in error, when he was stopped by the court. Upon the third point, he insisted that the Bank was not the depository of State sovereignty, and could not claim the privileges incident thereto. This point he said had been repeatedly so ruled. [3 Ala. Rep. 258; Ang. & Ames on Corp. 24, note 1; 9 Wheat. Rep. 907; 2 Peters' Rep. 318; 2 Brockb. Rep. 393; 3 McC. Rep. 377; 1 Hawks' Rep. 36.]

COLLIER, C. J.—In Owen, et al. v. The Branch Bank at Mobile, [3 Ala. Rep. 258,] this court was of opinion that our Banks, of which the State is the exclusive proprietor, are corporations "created for the purpose of banking, not on the credit of the State, but upon a fund provided for that purpose." That they could sue and be sued, and were invested with the attributes necessary to the existence of a corporation. Had we there attained the conclusion that the note issued by the Bank were in point of fact emitted by the State, we must have adjudged that these institutions were brought into existence by the legislature in violation of the constitutional restriction upon its power, which inhibits the emission of bills of credit by the States. [See Craig v. The State of Missouri, 4 Pet. Rep. 410.]

The constitutionality of a law establishing a Bank, of which the State was the sole proprietor, came directly before the su-

preme court of the United States, in Briscoe v. The Commonwealth Bank of Kentucky, [11 Peter's Rep. 257.] In that case, the capital was two millions of dollars, and to be made up of various funds and receipts from several sources of revenue, which the statute particularized; and the Bank was authorized to do the ordinary business of such an institution, such as discounting notes, &c.; but its debts were not to exceed double the amount of its capital. The court held that the Bank was a corporation; that its issue were not made on the faith of the State, but they were to be paid in gold or silver on demand, from a fund provided for that purpose, and placed under the control of the directory.

In the U. S. v. The Planters' Bank of Georgia, [9 Wheat. Rep. 907,] the court were of opinion, that "the State does not by becoming a corporator, identify itself with the corporation. The The *Planters' Bank of Georgia* is not the *State of Georgia*, although the State holds an interest in it." "*Again*, it is a sound principle, that when a government becomes a partner in a trading company, it divests itself so far as concerns the transactions of that company of its sovereign character, and takes that of a private citizen." [See also the Bank of Kentucky v. Wister, et al. 2 Peters' Rep. 318.] This reasoning we think, applies with all force where the State is the sole corporator, as well as where it is associated with others. The Bank of the State is a mere creature of the legislature intended "to provide," in the language of the preamble of the charter, "for the safe and profitable investment of such public funds, as may now, or hereafter, be in the possession of the State, and to secure to the community, the benefits, as far as may be, of an extended and undepreciating currency." [Clay's Dig. 77.] It cannot be endured, that the legislature, which is but the mere machinery of government, should be allowed to confer upon a monied corporation, established by itself, any portion of the sovereign power, which was inherent in the body politic.—Whether it would be competent to prescribe a different limitation to the recovery of its demands, from that which is applied to individuals and private corporations, is a question that need not be considered; for a dispensation from the influence of such laws is here claimed, not in virtue of expresses legislation; but as one of the prerogatives of government.

In the Bank of South Carolina v. Gibbs, [3 McC. Rep. 377,] the question was, whether a simple contract debt due the Bank, was

a debt due to the public, within the meaning of the act, relative to executors, &c. which entitles the State to a priority of payment. The court determined, that it was not a debt due to the public, and that although the Bank was owned entirely by the State, it could claim no priority on that ground. And in the Bank of North Carolina v. Clarke, &c. [1 Hawks' Rep. 36,] it was decided, that the State Bank of that State, was a mere private corporation.

The only case that we have been able to find, in which a different doctrine is maintained, is the State Bank of Illinois v. Brown, et al. [1 Scammon's Rep. 106.] There the court cite some of its previous decisions, which determined that the directors of the Bank die not act for their own benefit, and that their omission and neglect did not work an injury to the State; that a release from all debts due to the State was a release of a debt secured to the Bank by mortgage; and that the State is not barred by a statute of limitations, unless expressly named. It is also said, that "by the statute creating the State Bank, it is declared, that it shall belong to the State of Illinois. Hence," say the court, "it follows that the people of Illinois are the real plaintiffs, and are alone entitled to the benefit of the recovery." This reasoning, it must be admitted, is unsatisfactory, and altogether inconclusive; it entirely loses sight of the grounds upon which a State is held not to be bound by a statute of limitations, which does not apply to it *eo nomine*. The decision rests alone upon the basis that the State being the sole proprietor of the Bank, a debt due to the latter, is due to the State, and not barred by the statute. This conclusion cannot be supported.

The judgment of the county court of Dallas, is correct in law; and is consequently affirmed.

BUFORD v. WELBORN.

1. It is discretionary with a court to permit a garnishee to amend his answer, and that even after an issue has been tried between the plaintiff and one to whom the debt attached is supposed to be transferred.
2. The answer of a garnishee admits the receipt of a sum of money from the debtor, to be accounted for to him by the garnishee on a final settlement, but insists that since the service of garnishee process, he has been compelled to pay larger sums for the debtor, so that on a final settlement, nothing will be due; this is not such an admission of indebtedness as will authorise a judgment against the garnishee. If the right to set off debts paid subsequently to the service, could be defeated, it was the plaintiff's duty to have drawn out the facts by interrogatories, or by forming an issue to try the question of indebtedness.

WRIT of error to the Circuit Court of Barbour county.

This is a proceeding by Buford, against Welborn, who was summoned as a garnishee to answer what he was indebted to Seth Lore and Edward Sheppard or either of them.

The garnishee appeared and answered, that at the service of the garnishment, he owed Edmund Sheppard $434 50, by a judgment for that sum, recovered in said court; but that he had been notified that the judgment had been transferred by Sheppard to his son William P.; besides which, the garnishee was liable to pay a large amount of money for Edmund Sheppard, and that he could not secure himself, but by having his claim set-off against what he owed him on the judgment, by reason of his insolvency. The garnishee also answered, that he was indebted nothing further; and thereupon, moved to be discharged. This motion was overruled, and the further proceedings against the garnishee were suspended until the plaintiff and William P. Sheppard should contest the validity of the transfer of the judgment. These parties subsequently made up an issue which was tried by a jury, who ascertained by their verdict that the transfer of the judgment was fraudulent and void.

The plaintiff then moved for judgment against the garnishee, upon the answer formerly made by him. The garnishee at the same time moved for leave to come in and amend his answer, which the court permitted, although resisted by the plaintiff. The

garnishee then amended his answer by stating that since his former answer, the judgment therein mentioned had been reversed by the supreme court, and held for naught, and dismissed from the circuit court, in which it was existing at the time of that answer. The said judgment was founded on a written admission of the garnishee, that he had received $395 20, belonging to Edward Sheppard on the 19th February, 1839, for which the garnishee agreed to account on a final settlement with him. That in his former answer, he had only answered as to the part of the judgment, without stating the nature of the writing on which it was founded. He also answered, that on a final settlement with Sheppard, the latter would be greatly indebted to him, as the garnishee had paid large sums of money for him since his first answer, amounting to more than the sum stated in said writing.

On the amended answer, the court discharged the garnishee.

It is now assigned that the court erred,

1. In permitting the garnishee to amend his answer.
2. In discharging him upon the amended answer.

Buford, for the plaintiff in error, made the following points:—1. The process of garnishment acts upon the condition of indebtness, as it is at the service, and is not affected by subsequent transactions or circumstances. [Hazard v. Franklin, 2 Ala. Rep. 351; McRae v. McLean, 3 Porter, 138; Kennedy v. Raguet, 1 Bay, 484; Clay's Dig. 59, § 19.]

2. The garnishee here, is not entitled to retain an account of subsequent payments made by him for Sheppard, either as surety or indorser. [Holmes v. Bullock, 4 Ala. 228; Colgin v. Cummings, 1 Porter, 148; French v. Garner, 7 Porter, 549; Taylor v. Gardner, 2 Wash. C. C. 488; Serg. on Attach. 103; 15 Mass. 414, 490; 16 ib. 473.]

3. If the garnishee's claim is in the nature of an off-set, he must show such a state of facts as would enable him to maintain an action at the time of the service. [Crawford v. ex'r of Simonton, 7 Porter, 110.]

4. The court should not have allowed the answer to be amended after the trial of the issue between the claimant and the plaintiff. [Clay's Dig. 63, § 39, 40, 44.]

Sayre, *contra*—argued, 1. That process of garnishment is to

be considered the institution of a suit against the garnishee, and it is at all times a matter of discretion, to allow the party to amend his answer, which is in the nature of pleading.

2. Before a judgment can be properly rendered against a garnishee, there must be a distinct admission of a debt due.—Here there is no such admission, and consequently there is no error in the discharge of the garnishee. If the plaintiff had wished to contest the fact of indebtedness at the time of the service, he ought to have presented an issue under the statute.

GOLDTHWAITE, J.—1. We think it entirely competent for a court to permit a garnishee to amend his answer whenever the justice of the case requires it. The permission to do so, is the exercise of a discretionary power, which is not the subject of review on error. In the present case, however, its exercise was quite proper, because the judgment admitted as the indebtedness by the former answer, had been reversed, and therefore, it became essential to the rights of the garnishee, to ascertain whether there was any debt due from him to the debtor, subject to attachment.

2. On the subject of garnishee's answers, the practice under the several statutes is now well settled, that before there can be a judgment rendered, there must be a distinct admission of indebtedness to the person, as whose debtor he is summoned. [Fortune v. State Bank, 4 Ala. Rep. 385. and cases there cited.]—Here, the answer does not in our opinion contain such an admission; the money received by him belonging to the debtor, was only to be accounted for upon a final settlement. Whether this receipt would admit the interpretation, that all open transactions in which the garnishee was involved as security or indorser for the debtor, was intended to be included, is a matter which we deem it unnecessary to determine, as it was entirely within the power of the plaintiff to have called on the garnishee in the examination for answers to such questions as he wished to ask respecting the nature of the debts which the garnishee claimed the right to set-off. Or, if the answer was doubtful or unsatisfactory, he could have insisted upon an issue, to try the question of indebtedness upon making the affidavit required by the statute. [Clay's Dig. 60, § 25.] It is not competent to the plaintiff when the opportunity is given him by law, of calling out direct and explicit an-

swers to all questions relative to the indebtedness, to ask the court for a judgment upon any other than a distinct admission of indebtedness at the time of service.

We think there is no such admission in this amended answer, and therefore, the court did not err in discharging the garnishee.

Judgment affirmed.

TURNER v. ELDRIDGE.

1. A bond in which the obligor promises "to pay James W. Camp for the benefit of Alfred Turner," may be declared on as a bond payable to James W. Camp.
2. The meaning of the promise is that it is, for the use of Alfred Turner.
3. The fact that the beneficiary is a minor, and the obligor, his father, cannot be pleaded in bar of the action.
4. It is not error for the court to permit the jury, after they have dispersed, again to retire, and make a re-calculation of the interest, if upon their return the plaintiff object to receiving their verdict, and the verdict previously rendered is not disturbed.

ERROR to the County Court of Talladega.

Debt by the defendant in error, as assignee of a bond, which reads thus:

"For value received, ten days after date I promise to pay Jas. W. Camp, for the benefit of Alfred Turner, five hundred dollars. Witness my hand and seal, this 3d day of November, 1840."

H. B. TURNER."

The declaration, in the description of the bond, omits to set out for whose use it was made, but declares upon it a bond payable to Camp.

The defendant pleaded a special *non est factum* from the omission to set out the beneficiary in the bonds in the description in the declaration; also, that the obligee in the bond received it as trustee for Alfred Turner, and that he had no interest in the bond other than as trustee; also, that Alfred Turner, for whose benefit

the bond was made, is an infant under the age of twenty-one years, and that the assignment of the bond to the plaintiff was made without the consent of the infant or his guardian; and also, that the defendant is the father and natural guardian of said Alfred Turner, at the time of the execution of the writing obligatory, was and still continued under his control.

These pleas were demurred to by the plaintiff, and the court sustained the demurrer.

Upon the trial, the defendant objected to the bond and indorsement being read to the jury, but the court permitted it to go in evidence to the jury. The defendant proved the infancy of the plaintiff, and that he lived with the defendant, and offered to prove his declarations as to his interest in the bond, which, on motion, the court excluded.

The defendant asked the court to charge the jury, that he, as guardian by nature, was entitled to the right of the infant in the said bond, and that the plaintiff could not recover; which the court refused: to all which the defendant excepted; and the jury having found a vercict for the plaintiff, judgment was thereupon rendered.

On the next day, the jury appeared in court and stated they had made a mistake in the calculation of interest, and were permitted by the court against the will of the defendant again to retire with the papers in the cause, and returned a verdict for an increased amount; when the plaintiff moved the court, that the latter finding by the jury be discharged, and that the judgment as first entered up, should stand; which was granted, and to which the defendant excepted.

The assignments of error are, the judgment of the court on the demurrers to the pleas, and the matters set forth in the bill of exceptions.

Rice, for plaintiff in error.
W. Chilton, *contra.*

ORMOND, J.—The counsel for the defendant in error insists, that the proper meaning of the promise to pay "for the *benefit* of Alfred Turner," is, that it was to be paid on his account. Such may have been the intention of the parties, but that is not the natural import of the language employed; and having that

only for our guide, we must understand it to be a promise for his *use*. But this does not alter the legal effect of the instrument; it is in law merely a promise to pay James W. Camp; and it was, therefore, not necessary to notice the beneficiary in the declaration. This disposes of the special *non est factum*, which is pleaded upon the supposition that the legal effect of the instrument, as described in the declaration, is different from that on which the suit is founded.

The fact that the beneficiary is a minor, and the obligor, his father, cannot be pleaded to defeat this action. If the money in fact belongs to the minor, the plaintiff will hold it in trust for him. Whether the father, as the natural guardian, may not be entitled to it, when collected, is a question which cannot be raised in this collateral manner, or pleaded in bar of this action, as he is estopped by his own deed from denying the right of the plaintiff to recover.

The irregular action of the court in permitting the jury to deliberate upon the case after they had given a verdict, and judgment had been rendered thereon, cannot be reviewed in this court, as there was no action upon the second verdict, and the judgment previously rendered was not disturbed. The plaintiff in error cannot complain of it, as he was not in any manner prejudiced by it.

We are unable to perceive any error in the judgment, and it is, therefore, affirmed.

THORNTON v. KERR & HOPE.

1. The admission of one person that another was his partner, is not evidence to establish the existence of a partnership, and the fact that the party making the admission is not sued in the same action, or is dead, can have no influence upon the admissibility of the evidence: the representatives of a deceased partner are made liable at law, if the survivors are insolvent.

WRIT of error to the Circuit Court of Chambers.

The defendants in error declared against Wm. A. Thornton, Parham M. Thornton and Alexander H. McDaniel, as partners, trading under the style and firm of Thornton & McDaniel, in assumpsit, on two promissory notes, amounting in the aggregate to the sum of nine hundred and seventeen 65-100 dollars. W. A. Thornton denied by plea that the notes in suit were made by him or his authority, and verified his plea by affidavit. By consent of parties, P. M. Thornton was admitted to be a bankrupt, and a verdict allowed to be rendered in his favor; and McDaniel having died pending the suit, the action abated as to him.

On the trial of the issue, the defendant below excepted to the ruling of the court. The bill of exceptions shows that the plaintiffs proved that McDaniel, the deceased party, said that the defendant was his (McDaniel's) partner; to the admission of this evidence the defendant objected, but the court being informed by the plaintiffs' counsel that they would connect other evidence of the partnership with the declarations of McDaniel, the objection was overruled. After the plaintiffs closed their testimony, the defendant moved to exclude from the jury the declarations of McDaniel as to the partnership; but there being other testimony tending to establish the partnership, the court overruled the motion. The jury returned a verdict for the plaintiffs, and a judgment was rendered thereon.

S. Heydenfeldt, for the plaintiff in error, cited Gow on Part. 193; 4 S. & Porter's Rep. 34; 3 Stew't Rep. 201; 2 Wash. C. C. Rep. 388.

No counsel appeared for the defendant.

COLLIER, C. J.—The only question submitted to the jury, was, whether the defendant below made the note declared on, either personally, or by one who was authorized to bind him to its payment. In order to fix a liability, the declarations of one who represented himself to be the defendant's partner, is admitted to show that this relation existed between them. The fact that the party, of whose declarations the plaintiffs availed themselves, is not sued in this action, or is dead, can have no influence upon the admissibility of the evidence; for if the living partners are insolvent, it is allowable to sue the representatives of the deceased,

even at law, and recover a judgment for the firm debt. The act of 1839 is explicit upon this point. [Bartlett & Waring v. Lang's Adm'rx, 2 Ala. Rep. 401.] This being the case, it cannot be said that McDaniel, when living, was not interested in establishing a partnership between himself and the defendant, or that the burthens of his estate would not be lessened by showing such a connection. True, the representatives of the deceased would be liable to contribute the intestate's share of such judgment as might be recovered against the defendant, but if the plaintiffs are unsuccessful, the estate will be liable to the payment of the note *in solido.* The difference in the extent to which the estate will be chargeable according to the judgment in the case, shows that there was not an *equillibrium* of interest on the part of the deceased, and that his declarations were not evidence *per se.* [2 Phil. Ev. C. & H.'s notes, 112, 266.]

In Hutchins v. Childress & Baker, [4 Stew't & P. Rep. 43,] the court said, "The admissions of one partner are not evidence to establish the existence of the partnership; but after its existence has been otherwise proved or admitted, the act or declaration of one relating to the subject matter of the partnership, will bind all." [See, also, Story on Part. 159—160, 460, 2, & note 1.]

Whether the declarations of the deceased partner might have been so connected with other evidence as to make them admissible, we need not inquire. *Prima facie* they were admissible, either alone, or in connection with other proof; and if there existed a state of facts which rendered them competent, it should have been shown. It was not a sufficient reason for refusing to reject the declarations of McDaniel, that there was other evidence of partnership; the other evidence may not have been credited by the jury, or may have been considered by them as insufficient So that, in this view, the verdict may have been induced alone by evidence wholly incompetent.

The result of our opinion is, that the circuit court erred. Its judgment is consequently reversed, and the cause remanded.

GOLDTHWAITE, J.—I concur in the result of the opinion of my colleagues; but I do not assent to the proposition, that the admission of one that another is his partner, is *incompetent* evidence. In my opinion, it is admissible, but inconclusive. Every admission by one that he is the partner of another, includes

within it the admission that the other has a *joint* interest in the concern; and without this joint interest, there can be no partnership. When, therefore, there is the several admission by two persons that they are partners, each one admits the other to have a joint interest; and if the admissions of the two conjointly are competent, I am at a loss to see why the admission of each severally is not so too. It is apparent, however, that the one admission does not prove the joint interest or partnership until it is coupled with the other.

LUCAS v. THE GOVERNOR, FOR THE USE OF HARPER.

1. In declaring in an action of debt upon a sheriff's bond, the breach being assigned, that the sheriff made a false return of *nulla bona*, to an execution, at the suit of the plaintiff, it is not necessary to aver that the judgment upon which that execution issued is unsatisfied.
2. A recovery in an action against the sheriff for a false return, is no evidence to fix the liability of his sureties, when they are sued upon his official bond.

WRIT of error to the Circuit Court of Montgomery.

Action of debt, in the name of the present Governor, for the use of Harper, on a sheriff's bond executed by one Bell, and others, as his sureties.

The declaration avers a breach of the condition of the bond, by reason of Bell's false return of *nulla bona* to a writ of *fi. fa.* at the suit of Harper against one Hill.

The declaration does not aver that judgment against Hill was in full force, or that Harper had not received satisfaction of the debt; nor does it contain any equivalent averments, unless the one of damage, as the consequence of the false return, is entitled to that consideration. A demurrer to the declaration was overruled.

At the trial, the plaintiff, to maintain his action, gave in evidence the record of a judgment in his favor against Bell, in an

action against him, suggesting a default in not making the money on the same execution as that described in the declaration. The defendant objected to this evidence, and excepted to its introduction.

The defendant offered to prove that Hill, the defendant in the execution described in the declaration, was, during the whole time it was in the sheriff's hands, utterly and entirely insolvent; that he was so before its issuance, and continued to be so until its return; and that he had no property whatever out of which it could be satisfied. This evidence was excluded from the jury, on the ground that it was an attempt to contradict the record of the judgment against Bell. The only evidence before the jury was the record of the judgment against Hill, described in the declaration, the record of the judgment against Bell, and the sheriff's bond; and upon this, the court ruled that the plaintiff was entitled to recover, unless the judgment against Bell, as sheriff, was impeached for fraud or collusion. The defendant excepted to the several rulings of the court, and now assigns the same as error.

Hopkins, for the plaintiff in error, made the following points:

1. The declaration contains no cause of action, inasmuch as it is not shown that the debt was unsatisfied by Hill.

2. That the suit against Bell, as sheriff, was not conclusive evidence of his liability so as to affect the sureties on his bond. [5 Binney, 187; 2 Rand. 313, 319.]

Harris, *contra*, argued:

1. That the judgment against the sheriff, in the suit for the false return, is *prima facie* evidence in a suit against his sureties, and conclusive, if not impeached for fraud or collusion. [2 Bailey, 362; 3 Ohio, 487; 3 Atkins, 248; 5 Binney, 184; 1 Gilmer, 235; 2 Leigh, 393; 1 Wash. 31; 18 John. 391; 4 Binney, 352; 6 John, 159; 2 Rand. 313, 319.]

2. The rejection of evidence of the insolvency of the defendant in execution, was proper, as it had no influence to show fraud or collusion. [5 Pick. 380.]

3. The declaration is substantially good, as it contains every averment of fact that the plaintiff was called on to prove to make out his case. It is not necessary to exclude all idea of defence by the allegations of the declaration.

GOLDTHWAITE, J.—1. It is urged against the declaration in this case, that it contains no averment that the money due on the execution, with respect to which the false return is alleged, has not been paid by him against whom it was issued. This omission is, as we think, unimportant, for the declaration, without it, alleges every matter which it was essential for the plaintiff to prove; in other words, it shows the contract with the Governor in conformity with the requisitions of law, and a breach of that contract by reason of the alleged false return. It is true, the precedents, in the analogous action upon the case against a sheriff for a false return, set out an averment similar to the one of which the omission is now complained, but it seems to be only an adherence to the unnecessary verbiage which is yet to be found in practice. The general rule of pleading is, that it is not incumbent on the plaintiff to aver more than he is called on by the law to prove. [Hool v. Bell, 1 Ld. Raym. 174; 1 Chitty, 218.] And every one is familiar with that which allows all superfluous allegations to be rejected as surplusage. If, in point of fact, the execution had been satisfied or otherwise vacated, the proof must come from the defendant. For these reasons, we consider there was no error in refusing to sustain the demurrer.

2. The other questions ruled at the trial may be considered together, as they resolve themselves into an inquiry whether the judgment obtained against the sheriff individually, for the same default has any, and, if any, what effect in an action against his sureties.

In the case of McClure v. Colclough, [5 Ala. Rep. 67,] the question before us was, whether the sureties to a sheriff's bond, against whom a summary judgment, upon motion, had been obtained, under the statute, could, in equity, controvert the conclusiveness of that judgment; and we held they could not, inasmuch as the several statutes appear to indicate a legislative intention that the litigation, in that class of suits, should be confined to the plaintiff in execution and the sheriff. We also said there, that the only matters which the surety can litigate, in such cases, is the *factum* of the bond and its legal sufficiency. It will be seen that our opinion is there confined exclusively to the case of a summary judgment under the statute; but my own view is, that the legislative intention being to confine the litigation with respect to the breach of duty to the sheriff and the plaintiff, in that class of

cases, harmony of decision calls for the application of the same rule to all other cases where the sureties are sought to be charged. A majority of the court, however, think differently, and held the opinion, that when the plaintiff rejects the statutory mode of relief and pursues his common law remedy, he must be governed by the rules of the common law. The general rule is, that a judgment is no evidence against a stranger to it; but a large class of American cases seem to recognize and establish a modification of it so as to allow the judgment against the principal to be *prima facie* evidence against his sureties, when the latter are sued upon an official bond. [Carmack v. Commonwealth, 5 Binney, 184; Mumford v. Overseers, 2 Rand. 313; Jacobs v. Hill, 2 Leigh, 393; State of Ohio v. Colerick, 4 Ohio, 487. See, also, cases as to the effect of a settlement by an administrator or guardian, upon his sureties, collected in 3 Cowen & Hill's notes, 866.]

We have looked into these decisions, and so far as they held the judgment against the sheriff to be *prima facie* evidence against the sureties, it is impossible to perceive on what principle they rest. Doubtless, there are cases where the acts or admissions of the sheriff have the effect to bind his sureties; but it will probably be ascertained, whenever these are necessary to be examined, that the acts and admissions are a part of, or immediately connected with his official duty. The case of a judgment against him is certainly not of this description; and we can conceive of no reason why it should have any effect against his sureties, unless they are concluded by it. If such a judgment is *prima facie* evidence, any one will perceive the difficulty there is rebutting it; and why should any greater effect be given to a judgment obtained by default against a sheriff, or, by his confession, against his surety, when it is certain that his confession, by itself, would not be so? The judgment against the sheriff is not essential, in this State, to enable the party to proceed against the surety, and, therefore, seems to have no bearing in an action upon his bond. It may be remarked, that the case of a sheriff is entirely different from that of an administrator and guardian, inasmuch as a part of their duty is the settlement with the court.

It is, therefore, the opinion of the majority of the court, that a suit against the sheriff does not affect the sureties, when a common law action is brought on the bond. My own opinion is,

there is no middle ground between its admission, as conclusive of liability, or its entire rejection.

It results from this, that the record of the judgment against Bell was improperly admitted as evidence; and that the evidence for the defendant was improperly rejected.

Judgment reversed, and remanded.

JONES v. MELTON.

1. A judgment may be pleaded as a set-off, and if larger in amount than the debt sued for, a finding of the issue in favor of the defendant, will extinguish so much of the judgment as is necessary to satisfy the debt.

ERROR to the Circuit Court of Wilcox.

Assumpsit by the plaintiff against the defendant in error. Plea of set-off, consisting of a judgment obtained by the defendant against the plaintiff in the county court of Dallas. Demurrer to the plea, and demurrer sustained by the court, and judgment for plaintiff. The judgment of the court on the demurrer, is now assigned for error.

EDWARDS, for the plaintiff in error—cited 3 Cowen, 133; 8 ib. 126; 3 McCord, 318; 2 Chitty, 475.

GEO. GAYLE, *contra.*

ORMOND, J.—The statute of this State, [Clay's Dig. 338, § 141,] allows a set-off wherever there are mutual debts subsisting between the plaintiff and defendant, and it follows, that if a judgment is a debt, it may be a set-off. That a judgment is a debt, is too clear for argument, but it is supposed, that as our statute requires the jury to certify the sum which the defendant may establish beyond the plaintiff's demand, and for which the court is required to enter judgment in favor of the defendant, that this is

a virtual exclusion of judgments as sets-off, as there might be two judgments for a part of the same debt, in favor of the defendant. The statute permitting a judgment to be entered in favor of the defendant for the excess he may prove to be due him over the plaintiff's demand, does not apply where a judgment is pleaded as a set-off. The judgment is conclusive of the amount due, as well upon the jury as it is upon the parties to it, and it would not, therefore, be competent for the jury to certify any thing in relation to it. A finding upon the issue would extinguish so much of the judgment pleaded as a set-off, as would satisfy the debt sued upon.

The defendant might, it is true, have omitted to plead the judgment as a set-off, and after judgment against him by the plaintiffs, on motion to the court, have set-off one judgment against the other. He was not, however, obliged to pursue this course, which would have subjected him to the costs of the suit, but had the privilege of avoiding the costs by pleading it as a set-off.

Let the judgment be reversed, and the cause remanded.

LUCAS & BROOKS v. GODWIN.

1. Where the sheriff returns an attachment, levied on certain lands in the possession of a person not a party to the writ, it will be intended, in order to sustain the proceeding, that they were the property of the defendant, and levied on as such.

Writ of error to the Circuit Court of Russell.

N. W. Cocke, for the plaintiff in error—insisted, that the levy of the attachment by which this suit was commenced, was insufficient to sustain the judgment against the defendants below; that although, according to the decisions of this court, a levy upon *personal property* was sufficient, without an express affirmation of the sheriff, that it belonged to the defendant, yet the same principle did not apply to the realty. In the former case, the sheriff

would be a trespasser if he seized property of a third person, but in the latter, a levy upon the lands of a stranger would not be followed by such consequences. He cited 3 Monr. Rep. 294; Hardin's Rep. 44; 8 Dana's Rep. 67.

HEYDENFELDT, for the defendant.

COLLIER, C. J.—In Bickerstaff v. Patterson, [8 Porter's Rep. 245,] the sheriff returned that he had levied the attachment on sundry articles, without adding that they were the property of defendant. The court said, "the sheriff is an officer placed under great responsibility by the law, which defines his duties. He pledges to the public under the solemnity of an oath, his integrity and diligence; and consequently every reasonable intendment must be made in favor of the regularity of his official acts. When he receives process requiring him to levy upon the property of a particular individual, and he returns it according to its mandate, with his indorsement, stating that he had levied the same on property, (particularly describing it,) we must intend that the property seized, belonged to the defendant; because the process only authorised a levy upon his effects." [See also, Kirksey, et al. v. Bates, 1 Ala. Rep. N. S. 303; Miller, et al. v. McMillan, et al. 4 id. 527.] The reasoning employed in the case cited, applies with all force, to the case at bar.

The fact that the property there levied on was personal, and a mistake by the sheriff as to its liability to seizure, might result in more serious consequences to him, than would follow where process was levied on the lands of a third person, had no influence upon the judgment we pronounced. We laid down a principle applying alike to every description of property, and do not perceive how we can restrict it, without declaring it to be unsound *in toto*. The statement in the return, that Anderson and John Baldwin lived on the lands levied on, and were informed of the levy, can have no influence in determining its regularity. Although the natural inference from the fact of possession, is a right of property in lands, yet this presumption, like all others, is repelled by circumstances; and when an officer to whom process is addressed, requiring him to seize the estate of A. returns that he has taken property in the possession of B., it will be intended that the officer has done his duty, and that B. occupies either as a

trespasser or by permission of A. A positive affirmation by the sheriff, that the property attached belonged to the defendant, would have no influence upon the question of title, and could not be more potent than a levy unaccompanied by such a declaration. This is sufficiently shown by the reason upon which we rested the principle of Bickerstaff v. Patterson.

In respect to resident defendants, it can rarely, if ever, happen, that a judgment will be obtained upon an attachment, of the pendency of which they are ignorant; and as it regards non-residents, the judgment will only operate *entra territorium*, and cannot be enforced in another jurisdiction, unless the defendant had notice of the suit, and could have defended it.

The cases cited by the counsel of the plaintiffs in error, from Kentucky, depend upon a statute of that State, which we apprehend will be found to be unlike ours; or at least, has received a different interpretation.

But can the defendant be materially prejudiced where the sheriff has made an improper levy, or seized property which the attachment did not authorize? Is it not competent for the primary court to correct the irregularities of its officers, either by causing the return of a levy to be modified, or entirely vacated? And where that court cannot summarily interfere, may not a court of chancery prevent injury by means of an injunction or otherwise? These are questions which we merely suggest, but will not now attempt to answer.

It is not denied but the levy of the attachment is regular, and the return is only objected to because it states that the lands are occupied by third persons, and does not affirm that they belong to the defendants. This objection we have seen does not affect the judgment, and it is consequently affirmed.

MORROW & NELSON v. BIRD.

1. A judge of the county court is authorized to issue the writ of *habeas corpus* in all cases where the detention is claimed by virtue of civil process, and is empowered to judge of its validity in every aspect; he is therefore not liable to an action for discharging a debtor arrested on a *ca. sa.*

WRIT of error to the Circuit Court of Dallas.

Morrow and Nelson brought their action against Bird, to recover damages for his having, as judge of the county court, unlawfully discharged from custody, one Parkman, a debtor whom they had caused to be arrested on a writ of *ca. sa.* The declaration contains three counts, but the cause of action is substantially the same in all. It is alleged that a judgment was recovered by the plaintiffs against Parkman, in the county court of Dallas; that the affidavit required by law to be made previous to taking out a *ca. sa.* was made, and a *ca. sa.* issued, upon which Parkman was arrested, and held in custody by the proper officer; that the defendant issued a writ of *hab. cor.* by virtue of which, Parkman was brought before him, and was by him, without any lawful right or authority, discharged from custody. By means whereof the plaintiffs had sustained damage of five hundred dollars.

The defendant demurred, and the court gave judgment for him on the demurrer.

This is is now assigned as error.

G. W. GAYLE, for the plaintiff in error—insisted that the defendant, as judge of the county court, had no jurisdiction to discharge the debtor, and therefore, was liable to this action. [Clay's Dig. 462, § 2, 3; ib. 464, § 16, ib. 468, § 39; 1 Chit. Pl. 185; 2 John. Cases, 27; 3 ib. 85; 3 Cranch, 331; 15 John. 152.]

EDWARDS, *contra*—insisted the action, if one is maintainable, should be case, and not trespass. [8 Cowen, 178.] But no action whatever will lie, as the discharge was the exercise of a judicial power. The judge has the authority to inquire, if the deten-

tion be illegal, and this involves every matter which can arise before him. [Clay's Dig. 462, § 1, 2, 3; 9 John. 423.]

GOLDTHWAITE, J.—This action is against Bird, for having illegally discharged a debtor arrested on a *ca. sa.* at the suit of the plaintiffs, and brought before him as judge of the county court, upon a writ of *habeas corpus.*

By the 2d section of the 12th chapter of the Penal Code, it is enacted, that "whenever oath shall be made before any justice of the peace, clerk of the circuit or county court, or before any judge or chancellor, that any free person is detained, or held in illegal custody, in any place, other than the penitentiary, or the common goal of the county, it shall be the duty of such justice of the peace, clerk, judge or chancellor, to issue a writ, directed to the sheriff or coroner, commanding him to take into his custody, the person so alleged to be illegally detained or confined, and forthwith to have him before the judge of the county court, or some judge of the circuit court, or some chancellor, as may be most convenient; and such judge or chancellor, shall examine into the cause of the detention, and if the same is illegal, shall discharge the person so detained; if otherwise, he shall by warrant in writing, commit the person to the proper custody. [Clay's Digest, 462, § 2.] By the succeeding section, the power of the judge of the county court is extended to all cases whenever any person is confined in the county jail on any cause whatever, other than a commitment for, or a conviction of felony, or by sentence or decree of the circuit court, or court of chancery. [Ib. § 3.]

By a subsequent section, it is very distinctly pointed out, that a prisoner, by virtue of civil process, shall only be discharged in one of the following cases: 1. When the jurisdiction of the court has been exceeded, either as to matter, place, sum or person; when though the original imprisonment was lawful, yet by some act, omission or event which has subsequently taken place, the party is entitled to his discharge. 2. When the process is defective in matter of substance, rendering such process void.—3. When the process, though in proper form, has been issued in a case not allowed by law. 4. When the person having the custody of the prisoner under such process, is not the person empowered by law to detain him. 5. When the process is not au-

thorised by any judgment, order or decree of any court, nor by any provision of law. [Ib. 468, § 39.]

From these enactments, it will be perceived that the judge of the county court is, by law, invested with the authority to issue the writ of *habeas corpus*, in all cases where the detention is claimed by virtue of civil process; and that he is also constituted the judge to determine upon its legality in every aspect in which it can be presented. It results that a mistaken exercise of judgment, is not a matter for which he can be called on to answer, either civilly or criminally.

Citations of authorities for this are unnecessary, for it is one of the cardinal maxims of the law.

There is, therefore, no error in the judgment of the court below, and its judgment is affirmed.

GOODWIN v. BROOKS, ET AL.

1. The design of the act of the 5th February, 1840, which requires a summons to issue to the assignee or transferee of a debt when the garnishee has disclosed by his answer that such is the fact, was to enable the plaintiff in attachment to contest the validity of the alleged transfer. In such a case the proper course is for the plaintiff to alledge the invalidity of the transfer to which the assignee would be required to answer, and thus an issue would be made, to be tried either by the court or jury, as might be proper.
2. When the record does not disclose that upon the appearance of the assignee the plaintiff made an allegation against him, an order discharging the assignee, will be upheld, as it must be presumed that the plaintiff abandoned the pursuit of the garnishment.

WRIT of error to the Circuit Court of Russell.

The plaintiff in error caused an attachment to be issued against Wm. D. Lucas and Hiram Brooks, as non-resident debtors; and John C. Baldwin, who was summoned as a garnishee, answered, that in the spring of 1840, he purchased of Brooks a tract of land for $2213—gave him his three promissory notes; one, for $613,

payable on the 25th December, 1840; another, for $800, payable on the 25th December, 1841; the third, for $800, payable on the 25th December, 1842. Some time in the summer of 1842, Terrill Brooks, the brother of H. Brooks, called on the garnishee with the notes—proposed that he should substitute three notes, in all respects similar to them, save only that they should be made payable to him instead of the original payee, so as to prevent the amount from being taken by garnishment at the suit of the creditors of H. Brooks, who had previously left the State. *Further*, that the garnishee had received a letter from H. Brooks, in which he said that the claims were still his, that he had no intention of suing the garnishee, and requested him to see T. Brooks, stop the suit, and make the notes again payable to him.

The plaintiff, wishing to contest the transfer of the notes mentioned in the answer of the garnishee, a notice was accordingly issued to Terrill Brooks to appear at the then next term of the circuit court to contest with the plaintiff the right to money due thereon.

A judgment by default was rendered against the defendants in attachment, and the plaintiff's damages assessed at six hundred and ten 75-100 dollars, and the judgment made final for that sum and costs.

An order appears in the transcript reciting the substance of the garnishee's answer, the notice to the holder of the notes in question, and concludes as follows:

"On motion of said Terrill Brooks' attorney, it is therefore ordered and considered by the court, that the said Terrill Brooks be discharged from answering to said notice, and from contesting the same; and it is further considered by the court, that the said Terrill Brooks recover of the said plaintiff the costs in this behalf expended," &c.

S. Heydenfeldt, for the plaintiff in error, insisted that the debt was still due from Baldwin to H. Brooks, although the written evidence of that fact had been extinguished; and T. Brooks could not claim any advantage merely because he had delivered up the original security, and taken one payable to himself. Such was, doubtless, the opinion of the court that made the order upon the garnishee's answer, and that order should have been adhered to at a subsequent term, as an adjudication of the question.

ORMOND, J.—The act of 5th Februrary, 1840, requires a summons to issue to the assignee or transferee of a debt, when the garnishee discloses, by his answer, that he has received notice that the debt in his hands has been assigned or transferred.—[Clay's Dig. 63.] The design of this law was to enable the plaintiff in attachment to contest the validity of the alleged transfer or assignment. The statute does not point out the mode in which this contest shall be made; but as it does not contemplate that the assignee shall answer the process of garnishment, effect can only be given to the statute by requiring the plaintiff in attachment to allege the invalidity of the assignment or transfer, to which the assignee would be required to answer, and thus an issue would be made to be determined either by the court or jury, as might be proper. Here, it appears, the assignee appeared in obedience to the summons, and the plaintiff in attachment making no allegation whatever against him, the court discharged him. We are unable to perceive what other course the court could have pursued. The plaintiff must be presumed to have been in court when the cause was called, and making no objection, must be intended to have abandoned the further pursuit of the garnishment. The plaintiff in attachment is the actor in the proceeding, and if he does not prefer his allegations against the assignee, he will be entitled to his discharge for the omission of the plaintiff to prosecute the inquiry. These are the necessary legal inferences from the record; and if in truth the plaintiff has not abandoned the prosecution, and the court improperly, and against the will of the plaintiff, discharged the assignee, it should have been disclosed by bill of exceptions.

Let the judgment be affirmed.

COLLIER, C. J.—The provision of the attachment law, under which Terrill Brooks was summoned to contest with the plaintiff the validity of the transfer, under which he claimed the notes in question, clearly authorized the notice that was awarded by the circuit court. The fact that Baldwin, the garnishee, had substituted for the original, new notes payable to Terrill Brooks, cannot exempt the debt from the process of garnishment, if the transfer was fraudulent or voluntary as between the latter and Hiram Brooks. There is, then, no reason shown why the proceeding was dismissed, and the holder of the notes discharged. The

plaintiff does not appear to have been in default; if an issue was necessary, it was to be made up under the direction of the court; the plaintiff should have been required to proceed in the cause, instead of being turned out without an opportunity of litigating the question proposed.

The premises upon which the court found the order of dismissal, is the answer of the garnishee, and the notice to Terrill Brooks; and there is not the slightest intimation that the plaintiff was not in court ready to do whatever the law required of him. Now, according to logical sequence, it must be intended that the decision of the court was influenced by the premises stated; and that it was supposed the facts did not authorize the proceeding. The assumption that the plaintiff was in fault, is, I think, unwarranted; and to maintain that he should have excepted to the judgment of the circuit court, is to require that which, in my opinion, does not comport with the analogies of the law.

Influenced by these views, I am constrained to dissent from the conclusion which my brethren have expressed.

ROBBINS, ET AL. v. THE GOVERNOR OF ALABAMA, USE, &C.

1. A bond executed by the name of Jas. W. will be admitted under a declaration which states the obligor's name to be James W.; the latter will be intended to be the true name, and the former a mere contraction of it.
2. *Semble:* Where a sheriff collects the amount of an execution, by receiving property, or in some other irregular manner, and accepts it as a satisfaction from the defendant, if the plaintiff elect so to consider it, the sheriff cannot object, in an action on his bond, that the execution was not paid with the money.
3. In an action on a sheriff's bond, one of the breaches, that the sheriff had before the return day of the *fi. fa.* settled the same with the defendant therein, discharged him from its payment, and thus made himself liable, &c.: *Held*, that the generality of the breach was such, as to admit evidence to show that the act by which the execution was satisfied, was a conversion of the money to the sheriff's use; if such were the case, no demand need have preceded the institution of the suit, and the sheriff would be chargeable with interest from the

time of the conversion, on the amount (saving the cost,) then due on the execution.

WRIT of error to the Circuit Court of Coosa.

This was an action of debt at the suit of the defendant in error, for the use of Walter T. Colquitt, against the plaintiffs as the sureties of the sheriff of Coosa, in his official bond. In one breach it is alleged, that the sheriff (since deceased) had collected the amount of a *fieri facias* placed in his hands at the suit of the real plaintiff, &c. which he had failed and refused to pay over. In another breach, it is stated, that the sheriff had before the return day of the *fi. fa.* settled the same with the defendant therein, discharged him from its payment, and thus made himself liable to the party for whose use this suit is brought. The third breach avers that although the defendant in the *fi. fa.* had ample property in his possession, from which the same might have been satisfied, yet the sheriff neglected and failed to levy and satisfy the same.

The cause was tried by a jury on an issue of fact, but the record does not discover in what form it was made up. A verdict was returned in favor of the plaintiff, and a judgment was rendered accordingly. On the trial, a bill of exceptions was sealed at the instance of the defendant, from which it appears that the bond offered in evidence was executed by "*Jas.* W. Yarborough," and the other obligors, while in the declaration this obligor is described as "*James* W. Yarborough." The defendants moved the court to exclude the bond adduced, upon the ground that it varied from that declared on; but their objection was overruled, and the bond went to the jury as proof in the cause.

Further: The defendants' counsel moved the court to charge the jury, that upon the second count, the plaintiff could not recover interest beyond the return day of the *fi. fa.*, on the amount of the same, or until after a demand made of the sheriff or his administrator. This charge was refused; but the court instructed the jury, that to enable the plaintiff to recover on that count, no demand was necessary, and that they had full discretion to allow the plaintiff the damages sustained by the breach thereof according to the proof. That they might take the judgment with interest from date as the criterion, or they might allow a less sum, should they deem it commensurate with the damage sustained.

J. A. Elmore and W. P. Chilton, for the plaintiffs in error.—The variance should have induced the exclusion of the bond from the jury; but if there was no error in this, the charge of the court as to the calculation of interest, cannot be supported. [7 Porter's Rep. 110; 5 Mason's C. C. Rep. 332.]

Morris, for the defendant.—The variance was too trivial to notice. If the declaration had professed to set out the bond according to its tenor, then perhaps it may have been material. [10 Mass. Rep. 203.] The declaration contains but a single count, with three breaches, and the charge was doubtless prayed in reference to the third breach, but if applied to either, the instruction is unexceptionable. The measure of the damages was the amount of the judgment, with interest, since its rendition.

COLLIER, C. J.—The objection that the bond was not correctly described in the declaration, and therefore should have been excluded from the jury, is not well taken. It must be intended that *James* W. Yarborough was one of the obligors in the bond, and that "*Jas* W. Yarborough," the name by which he executed it, was a mere contraction of his christian name; for it is too well known not to be a matter of judical recognition, that *Jas.* is frequently written as an abreviation of *James*.

It is not shown by the second breach alleged, how the sheriff settled with the defendant in the *fi. fa.* the amount thereof, whether by the receipt of money, property or otherwise. The allegation being so indefinite, it would have been allowable for the plaintiff to show that the amount of the execution was not collected in money according to its mandate; but that the sheriff received property, or that he was indebted to the defendant therein, and agreed to satisfy it for him. We need not consider whether any other mode of satisfaction than the payment of money, would be obligatory upon the plaintiff in execution; for if he elect so to consider it, the sheriff will not be allowed to object in an action against him for the money, that he has not done his duty. This breach then being so general, and allowing such a latitude in the evidence, we cannot know but it was proved that the act by which the execution was satisfied, was in itself a conversion of the money to the sheriff's use. If this were the case, no demand of the money need to have preceded the institution of

the suit. And under such circumstances, the sheriff, and of course his administrator, would be chargeable with interest accruing, not only after a demand, but ever since its conversion by the sheriff. The charge of the court as to the mode of computing the damages, was less favorable to the plaintiff than the rule as we have stated it. According to the law as laid down by us, interest might be calculated upon the interest due on the execution up to the time of the settlement between the sheriff and defendant in execution; but the instruction to the jury does not allow the interest to be compounded—it gives it alone upon the principal, from the rendition of the judgment. This, it will follow, from what we have said, was the proper period from which to make the computation. It can scarcely be necessary to adds that the measure of damages against the sureties of the sheriff, if liable at all, is the same as that recoverable of their principal.

No question arises upon the pleadings as to the liability of the defendants, if the facts alleged in the declaration are made good by proof. It is not insisted upon the record, that the proof does not authorise a recovery against them, unless the supposed variance, which we have already considered, will be well founded. But the objection is, that the criterion by which the jury were instructed to estimate the damages, subjected the defendants to a recovery, beyond which the plaintiff was entitled. Applying the prayer for instructions to the second breach, as the declaration contains but a single count, we have seen that the circuit court did not misapprehend the law—its judgment is consequently affirmed.

ROBINSON, USE, &c. v. CURRY AND HAYNEE.

1. In a declaration upon a bill single, it is a sufficient excuse for the omission, to make profert, that the defendant wrongfully and illegally obtained possession of it from an attorney of the plaintiff; nor is it necessary in such a case to file an affidavit of the loss of the bill, under our statute.

WRIT of error to the Circuit Court of Pickens.

Action of debt by Robinson, for the use of McEwin against Curry and Haynee, as joint obligors, by a certain single bill.—The declaration contains two counts, in neither of which is there any profert *in curia* of the bill; but as an excuse therefor, there is an averment in the first count, that the defendants wrongfully and illegally obtained possession of the bill from the hands of one Maupin, then and there acting as attorney for the plaintiff, without lawful payment therefor; and which bill the said defendants, on demand, refused to return to the plaintiff. The second count contains substantially the same excuse for the omission to make profert. The defendants demurred to the declaration, and the court sustained the demurrer. This is the only error assigned.

L. Clark, for the plaintiff in error.
B. F. Porter, *contra.*

GOLDTHWAITE, J.—The excuse alleged in this declaration for the omission to make profert, traces the bill single to the possession of the defendant, and avers that possession to be tortious. It does not differ, in any respect, from Totty v. Nesbitt, [3 Term, 154,] or Mattison v. Atkinson, [ib.] In the first of these cases, the defendant had admitted in his answer to a bill in chancery, that he had executed the bond, and that it had been discharged by him; and in the other, the defendant had obtained and cancelled the bond under an award of arbitrators, which afterwards was set aside. We do not perceive that any substantial reason exists why a party from whom the obligor unlawfully withholds a bill single, should be driven to his action of trover to recover damages for the conversion, instead of an action of debt, directly upon it.

It is supposed, however, that the statute requiring an affidavit to be filed when suit is commenced on a lost note or other instrument, [Clay's Digest, 333, § 112,] applies to this case. We think otherwise; because it seems to us the object of that statute is to furnish information to the other party of the loss of the instrument. Here, however, the affidavit would advise the defendants of no facts which they were not already apprised of.

We think the declaration unobjectionable on demurrer; and, therefore, the judgment is reversed, and the cause remanded.

PATTERSON & HINSON v. BURNETT, Adm'r.

1. An objection to the revival of a suit in the name of an administrator, can not be made in this court, if not raised in the court below.
2. A mistake of the clerk in stating the parties in the minutes of the judgment entry, is a clerical misprision, amended by other parts of the record.
3. The reading to the jury of an affidavit of the loss of an instrument, and *its contents*, will not prejudice the party on error, though irregular, if the witness gave oral testimony also to the jury, of the contents of the paper.

Error to the Circuit Court of Wilcox.

Assumpsit by the intestate of the defendant against the plaintiff in error. The death of the plaintiff being suggested, the suit was revived in the name of Jonathan M. Hill, his administrator *ex officio*. At a subsequent term of the court, Samuel Burnett, sheriff, and administrator *ex officio*, was made a party plaintiff.—The entry of judgment is as follows:

Harris S. Evans v. Duncan A. W. Patterson and Atlas C. Hinson; which, after reciting the verdict of the jury, proceeds, "it is therefore considered by the court, that the plaintiff recover, &c."

From a bill of exceptions, it appears that the writ and the note upon which the suit was brought, were lost, and an affidavit of the fact of the loss, and a description of the note was made by the counsel of the plaintiff, and upon the trial the affidavit was read, as well as parol proof by the counsel who made it, of the loss, contents, and genuineness of the note. To the affidavit going to the jury, the defendant's counsel objected, but the court permitted it to be read to the jury, to which the defendant excepted.

The assignments of error present,

1. The judgment of the court.
2. The revival of the suit.
3. The admission of the affidavit as evidence.

ORMOND, J.—The case of Coopwood v. Taylor's adm'r, [7 Porter, 34,] is an authority fully in point, that the objection to the revival of the suit, cannot be made in this court, if not urged

in the court below. In addition, it may be added that the record shows that the suit was regularly revived, first in the name of Hill, as sheriff and administrator *ex officio*, and afterwards in the name of Burnett, as his successor.

The recital of the clerk at the head of the judgment entry, is merely for the purpose of identifying the cause to which the judgment relates, and if he makes a mistake in the name of one of the parties, it does not affect it. It is at most, a mere clerical misprision, which is amended by other parts of the record. The judgment is in favor of the "plaintiff;" who he is, is ascertained not by the declaration of the clerk, but by the record.

The note on which the suit was brought, having been lost whilst the cause was pending, the counsel for the plaintiff made affidavit of that fact, and also of the genuineness of the instrument, and filed it in the cause, apparently upon the mistaken supposition, that the act of 1828, prescribing the manner of suing on lost bonds or notes, was applicable to the case. [Clay's Dig. 382, § 9.] That applies only to suits commenced on a lost instrument, and does not apply where it is lost, whilst the cause is progressing. But if it did, the affidavit which the statute requires, would be evidence of nothing but the loss of the security. If in this case the affidavit had been alone relied on as proof of the loss and contents of the note, it would be undoubtedly erroneous; but it appears that the same witness swore to the same facts orally before the jury, and although the reading of the affidavit to the jury, was irregular, we cannot perceive that the defendant could by possibility, be prejudiced by it. It is not, therefore, such an error as will be available in this court.

Let the judgment be affirmed.

THE STATE v. MURPHY.

1. In an indictment for feloniously receiving stolen goods, knowing the same to have been stolen, it is not necessary to allege the name of the thief; whether

known or unknown; whether he was prosecuted or not; or to state the place where the larceny was committed.

2. An indictment which charges the felonious receiving of "sundry pieces of silver coin made current by law, usage and custom within the State of Alabama, amounting together to the sum of five hundred and thirty dollars and fifteen cents," does not describe the money with sufficient precision; but the number and denomination of the coin should be stated. Yet the proof need not be as full and precise as the allegation, but the accused may be convicted if he is shown to be guilty in respect to either one of the coins alleged to have been feloniously received.

3. Where a statute makes it an offence to "buy, receive, conceal or aid in the concealment of" stolen goods, &c., it prescribes four distinct offences, and the disjunctive "or" applies to each of the three verbs which precede, as well as to what follows; but an indictment which employs the terms "receive and conceal" in characterizing the offence, is good.

4. An allegation that solen goods were feloniously received "with intent to defraud the owner," is sufficient, and refers directly to the individual whose name had been before mentioned as the owner.

5. The evidence against one charged with an offence against the law, should be so convincing as to lead to the conclusion that the accused cannot be guiltless. If after subjecting the proof of guilt to the test of reason, there is still a doubt as to his guilt, it is the duty of the jury to acquit.

On points referred by the Circuit Court of Mobile.

The indictment charges that the defendant on the seventeenth of February, 1844, at, &c. "sundry pieces of silver coin, made current by law, usage and custom, within the State of Alabama, amounting together to the sum of five hundred and thirty dollars and fifteen cents, and of the value of five hundred and thirty dollars and fifteen cents, of the monies, goods and chattels of Thomas A. Morgan, before then feloniously stolen, taken and carried away, then and there feloniously did receive and conceal, knowing the same to have been feloniously stolen, taken, and carried away, and with intent to defraud the owner, contrary to the form of the statute, &c." To this indictment the defendant demurred, and his demurrer being overruled, he pleaded *not guilty*, and the cause was submitted to a jury who returned a verdict of guilty, and the defendant was sentenced to imprisonment for five years in the penitentiary.

On the trial, the defendant excepted to the ruling of the court. From the bill of exceptions it appears that the court charged the

jury: 1. That it was not necessary that the place where the larcery was committed, should be stated in the indictment; nor was the name of the thief, his indictment, trial or conviction necessary to be alleged, although he may have been known to the prosecutor before the indictment in the present case was found; nor was it necessary that any thing should be stated touching such prosecution, or any excuse for its omission, or that the defendant knew who was the owner of the goods in question: 2. That the rule contended for by the defendant's counsel, viz: "If the jury entertained a reasonable doubt of the guilt of the defendant, they ought to acquit him," did not apply except in trials for capital offences. But in cases like the present, they ought to weigh the evidence, and as it preponderated, find their verdict. If there were doubts of such a character as to produce a balance in their minds, then, evidence of good character ought to turn the scale in favor of the defendant.

The defendant after conviction, moved in arrest of judgment, that the indictment was defective for several reasons which he particularized; this motion being overruled, the court referred the several legal questions arising thereupon as well as those presented by the bill of exceptions, to this court as novel and difficult.

P. Phillips, for the defendant—made the following points: 1. That the offence charged in the indictment was a misdemeanor at common law, and still remained such, notwithstanding the punishment had been increased by statute; this being the case, the name of the principal thief, his prosecution, &c. should have been alleged, or if his name was unknown, or there was some other excuse for the failure to proceed against him, it should be stated. [Foster's Cro. L. 373; 2 Russell on Crimes, 242; 2 East's Cro. L. 745–8, 780; 3 Chit. Crim. L. 958; 3 Camp. Rep. 264; 2 Mass. Rep. 126; 16 id. 423; Clay's Dig. 425, 439, 440; Aik. Dig. 103.]

2. The indictment does not describe the money with sufficient particularity, viz: How many pieces of coin, the value of each, &c. [Russell & R. Cro. Cases, 482; 2 Russell on Crimes, 185–6; 1 Chit. Crim. L. 235; 3 id. 946; 2 Hale's P. C. 182; 3 M. & S. Rep. 548; 4 Serg't & R. Rep. 194.]

3. The indictment does not conform to the statute—"Buy, re-

ceive, conceal," are the words in which the latter describes the offence, while the charge is, that the defendant did "receive and conceal." [6 Bac. Ab. 390; 1 Plowd. 17; 4 Com. Dig. 687; 1 Stark. Crim. Plead. 200; 2 Hill's So. Caro. Rep. 459.]

4. Instead of alleging that the intent was to defraud the owner, generally, the indictment should have mentioned him *eo nomine*. [Arch. Crim. Plead. 340; 2 East's Cro. L. 988.]

5. The charge, that the rule entitling the accused to his discharge in the case of reasonable doubt, applies only to cases capitally punished, is clearly erroneous; and the error is not cured by the charge that follows.

THE ATTORNEY GENERAL, for the State—insisted, 1. There was no necessity for stating in an indictment against the receiver of stolen goods, the time when the larceny was committed, or by whom, &c. [2 East's Cro. L. 780; 3 Chit. Crim. L. 958; Arch. Crim. Plead. 233; 1 Eng. Cro. Cases, 371; 21 Wend. Rep. 86.]

2. The indictment need not have alleged that the defendant knew the goods were the property of T. A. Morgan; the feloneous reception, &c. of stolen goods, is an offence distinct from the larceny, and is well charged. [2 East's Cro. L. 780; 21 Wend. Rep. 86; Clay's Dig. 425.]

3. Money is specifically named in the statute—the proof of any particular amount is not at all indispensable to a conviction; for if the indictment stated that five hundred pieces were received, the proof of a single piece would warrant a verdict of guilty. [2 Wheeler's Crim. Cases, 511; Com. Dig. Indictment, (G. 5;) 3 Maule & S. Rep. 539.]

4. It was not denied that if the jury entertained a reasonable doubt as to defendant's guilt, they should have acquitted him; but it was insisted that the charge given, prevented injury, from the refusal to charge as prayed. [2 Phil. Ev. C. & H. Notes, 460; 12 Wend. Rep. 82; 5 Ala. Rep. 477, State v. Flanigan.]

COLLIER, C. J.—1. Archbold, in his work upon criminal pleading, furnishes the form of an indictment against the receiver of stolen goods, as a substantive felony in which no allusion is made to the principal felon, either by mentioning his name or alleging that it was unknown to the grand jury [page 233.] In Rex v. Jervis, [6 C. & P. Rep.] it is said not to be necessary to

state by whom the larceny was committed; and if averred, it is not necessary to state that he has been convicted. [See also, Rex v. Baxter, 5 T. Rep. 83.]

In The People v. Caswell, [21 Wend. Rep. 86,] the defendant was charged with having feloniously received of an ill-disposed person, to the grand jurors, known as D. B. a cow, the property of, &c.; the jury found the defendant guilty of feloniously receiving the cow, knowing her to have been stolen, without finding who was the thief. The court said, "the single question is, whether it be material in making out the crime of receiving goods, that the thief should be named or described. If it be material, the verdict is defective; otherwise not." Several English decisions are reviewed, which determine that where the felonious reception of stolen goods is prosecuted as a distinct felony, the name of the principal felon need not be mentioned in the indictment, or an excuse stated for the omission. It is said, "the receiving of stolen goods is, in its own nature an offence, if they be known by the receiver to have been stolen; and if directly alleged to have been stolen by A. it is difficult to conceive that the prisoner should be able to defend himself, either by proving that they were stolen by B., or the failure of the evidence for the prosecution to show a thief in particular, so long as the accused knew that they were stolen. It cannot, therefore, be an essential matter of description, that any one in particular committed the theft; and if one be named, this may be passed over as a mere circumstance."

Our statute, it is believed, goes quite as far as the statutes of England and New York to make the receiving of stolen goods a substantive felony. The sixteenth and succeeding section of the 4th chapter of the penal code are as follows:

"Every person who shall buy, receive, conceal, or aid in the concealment of any of the subjects of larceny mentioned in the preceeding sections, knowing the same to have been stolen, and with intent to defraud the owner, and be thereof convicted, shall be imprisoned in the penitentiary, not less than two, nor more than five years.

"It shall be competent to indict for the offence of buying, concealing, receiving or aiding in the concealment of money, or other property, although the principal offender may not have been tried or convicted." [Clay's Dig. 425.]

These provisions, it is believed, will not admit of an interpre-

tation different from what we have indicated. This being the case, it necessarily follows, that the first point made by the defendant's counsel cannot be maintained. The offence of receiving stolen goods, is not the less distinct from that of stealing them, because the statute omits *in totidem verbis* to characterize it as a felony; for whether it be a misdemeanor or a felony, the same effect must be given to the legislative will.

2. In respect to the second objection to the indictment, we think that the money alleged to have been stolen, is not described with sufficient particularity. The general rule in respect to goods stolen is said to be this, viz: that they should be described with such certainty as will enable the jury to decide whether the chattel proved to have been stolen, is the very same with that upon which the indictment is founded, and show judicially to the court that it could have been the subject matter of the offence charged, and enable the defendant to plead his acquittal or conviction to a subsequent indictment relating to the same chattel. [2 Russell on Cri. 168.] Hence it has been held, that an indictment for stealing 10*l.* in moneys numbered is not sufficient; some of the pieces of which that money consisted should be specified. So, where the defendant was charged with stealing 10*l.* in moneys numbered, and a pair of stockings, the judgment was arrested upon the ground that the description of the property was too general. [Id. 169.] It is also laid down, where the articles alleged to have been stolen consist of more than one, the number of the several individual things must be expressed in the indictment. [2 Hale's P. C. 182–3; 2 East's Cro. L. 777–8.]

In Stewart v. The Commonwealth, [4 Serg't & R. Rep. 194,] the indictment charged the larceny of sundry promissory notes amounting to the sum of eighty dollars; and the defendant being convicted, the judgment was reversed, because the indictment should have described the notes with more particularity, and should also have alleged that the money was unpaid on them. So, an indictment for stealing twenty ewes and lambs, without stating how many of each, has been held bad for generality of description. [3 Bac. Ab. 560.]

Even a declaration in trespass for taking fish, &c., or divers goods and chattels, without specifying the number or quality, has been considered too general. [1 Chitty's Plead. 3d Am, ed. 260.] So, where the plaintiff stated that he was the owner and

legal possessor of $2000 worth of personal property, the declaration was held bad after verdict. [Phelps v. Sill, 1 Day's Rep. 315.]

The authorities cited very satisfactorily show that the indictment should have stated the number and denomination of the coins alleged to have been stolen. The allegation might have been thus made; after charging the larceny of the aggregate sum in dollars, continued, to wit: —— dollars —— pieces of fifty cents, &c., amounting iu all to the sum aforesaid.

Now, although the law requires the denomination and number of coin to be stated in the indictment, it is not equally strict in its requisition as to the proof. The prosecutor is not bound to prove that the defendant received the exact number of the coin alleged to have been stolen; but if he proves the receipt of either of them under the circumstances stated in the indictment, it will be sufficient to authorize a verdict of guilty. [Com. Dig. tit. Indictment, (G. 5); The King v. Johnson, 3 M. & S. Rep. 548.]

3. It is insisted that the indictment does not charge the offence which the statute creates, and that the defendant cannot be visited with the punishment which it denounces. The terms used in the act are, "buy, receive, conceal, or aid in the concealment of," &c., while the indictment only employs "receive" and "conceal." We think it clear from the manner in which the sentence is framed, as well as from the subject matter, that the disjunctive "or" applies to each of the three verbs which precede it; and instead of the section in question prescribing but two, it makes four distinct offences where "any subject of larceny" shall go into the hands of a third person under the circumstances mentioned. To "buy" is one, to "receive" another, to "conceal" a third, and "to aid in the concealment," is a fourth. This being the case, it follows that the third objection is not well taken, and that the indictment, instead of being too limited in its averments, states more than was really necessary; but this, it is conceived, in a case like the present, cannot prejudice the case of the State.—[See 15 Pick. Rep. 273.]

4. The allegation that the money was received and concealed with the intent to defraud "the owner," is insufficient—the name of the person to whom it belonged had been before stated, and the term, "owner," pointed directly to him.

5. Every one charged with the commission of an offence

against the law, is presumed innocent until his guilt is established, and the evidence to induce conviction should not be a mere preponderance of probabilities; but it should be so convincing as to lead the mind to the conclusion, that the accused cannot be guilt less. If, after subjecting the facts to the test of reason, there is still a doubt as to his guilt, it is the duty of the jury to acquit; but a mere misgiving of the imagination, suggestion of ingenuity, or sophistry, or misplaced sympathy, is not a reasonable doubt to which the law accords any influence. The rule which we have stated as to the conclusiveness of proof applies as well to a case like the present as to one that the law visits with capital punishment; and the distinction made in the charge of the circuit judge is not defensible. Conceding that the part of the charge that follows is correct, and still it does not expurgate the preceding portion of it.

It follows from what has been said that the judgment of the circuit court is erroneous. It is consequently reversed, and the defendant ordered to remain in custody to abide further proceedings against him, or until he be otherwise legally discharged.

DESHA, SHEPPARD & CO. v. STEWART.

1. When a bill is drawn on a firm by the name of D. S. & Co , and the suit is in the name of three persons as partners, using the same firm name of D. S. & Co., the bill only being in evidence will not warrant the conclusion, when the evidence is demurred to, of the identity of the plaintiffs as the drawees of the bill.
2. The drawees of a bill who refuse to accept it, may sue upon it after being dishonored. Until acceptance, they are strangers to the bill, and may acquire rights to it, and stand in the same condition as any other holder. The legal presumption arising from the possession of the bill by the drawee before its maturity, or after its dishonor, is, that a consideration has been paid by him to some other lawful holder, but this presumption may be rebutted by shewing that he took up the bill as drawee, or obtained it from the drawer.

WRIT of error to the County Court of Dallas.

Assumpsit by three persons, describing themselves in the declaration as partners using the name of Desha, Sheppard & Co., as endorsees of a bill of exchange drawn by Stewart, in favor of one Harrison, on certain persons as Desha, Sheppard & Co.—There is no averment in the declaration that the plaintiffs are the same firm on which the bill is drawn, and there are counts upon it as dishonored for non-acceptance and non-payment. In both counts the bill is described as indorsed previous to its dishonor.

At the trial, the bill was produced with the protests for non-acceptance and non-payment, each containing the notary's certificate that notice of the dishonor was sent by mail to the defendant addressed to him at Athens, Dallas county, Ala.

This was all the evidence; and the defendant having demurred to it, the court gave judgment for the defendant. This is now assigned as error.

Edwards, for the plaintiff in error, insisted—

1. That it could not be judicially known that the plaintiffs and the drawees of the bill were the same persons; and unless such is the fact, there is no pretence of defence.

2. Assuming them to be the same persons, there is nothing which precludes them from maintaining the action.

Evans, *contra*, argued—

1. That the legal presumption arising from the fact of the drawees having the bill in their possession, is, that they have complied with the requisition of the drawer. The possession of an acceptor has this effect, and he can maintain no action on the bill. [Anderson v. Anderson, 4 Dana, 352; Petty v. Milne, 16 Wend. 553; Chitty on Bills, 648; Steph. Ni. Pr. 1550; 12 S. & R. 32; 9 S. & R. 385.]

GOLDTHWAITE, J.—1. The judgment on the evidence demurred to ought to have been given for the plaintiffs, independent of the main question argued here; because there is no evidence from which it can be legally inferred that the plaintiffs were the same identical parties on whom the bill was drawn.—This would not be the inference if a demurrer had been interposed to the declaration, where the legal question would have been precisely what it now is.

2. As the question raised and argued here is one which will return upon us immediately in another aspect of the case, we shall proceed to consider it. It is contended by the defendants, that the drawees of a bill cannot become the holders so as to enable them to maintain an action upon it against the drawer or indorsers. We shall consider the proposition with the qualification that the bill comes into their hands previous to its dishonor. The counsel of both parties admit their inability to find any adjudicated cases which bear directly upon the question, and our examination of the books has not been more successful.

In principle, however, the case presented, seems to be strikingly analogous to that which governs the acceptance or payment of a bill *supra protest.* A drawee may refuse to recognize the right of the drawer to consider him as his debtor by drawing the bill, and afterwards, *supra protest,* accept it for the honor of any one or of all the parties.

The rule is stated by Mr. Chitty, that the drawee may thus accept the bill; but he cites no authority but Beawes' Lex Mercatoria, unless Pardessus [407] is to be so considered, where he states the French law to be, that the drawee cannot so accept; though he may *declare* that he accepts only to oblige the drawer, and not admitting that he is his debtor. It is also said by Beawes, that when one has accepted a bill without having funds of the drawee in his hanks, and no provision has been made by him for payment, the acceptor may suffer the bill to be protested, and then pay *supra protest;* in which case, he will have a remedy *on the bill* against the drawer. [Lex Mercatoria, 52; Chitty on Bills, 542.] However questionable this latter proposition may be, it is, perhaps, persuasive, as the opinion of a very exact commercial law writer, to show the general favor with which the commercial law regards the rights of those who intervene to protect a bill from dishonor. All the authorities are in like manner persuasive to show that there is nothing in the commercial code which prevents the drawee, who refuses to accept, from afterwards becoming the holder of the bill by paying value for it; or which prevents him from having an action directly upon it when he does so. [Chitty on Bills, 543, 382.] At first, we were inclined to think that if a drawee comes into possession of a bill previous to its dishonor, the legal presumption is, that he takes it with the obligation to accept; but further reflection has

satisfied us, that no such presumption arises. When the drawee takes a bill from an indorser, he pays a consideration for it; and if there is no contract or engagement to accept it, there is no reason why, after its dishonor, he should not have the same remedy as any other holder. Until he has accepted the bill, he is as much a stranger to it as any other person.

We think, then, that whether in this case, Desha, Sheppard & Co. became the indorsees of the bill before or after its protest, they stand in the same condition as any other holder.

It has been urged, that this is a pretext to receive interest and damages on a bill, when, if accepted and paid, no such consequences would result. We do not doubt that it is entirely competent to the defendant in this case, to show that he placed the bill in their hands under the expectation that it would be accepted and paid to payee, or that it was actually paid by the drawee as such; and that on such proof, no action could be maintained on the bill. The only ground upon which they can be entitled to maintain an action on the bill, is, that a consideration has been paid by them to some other person for it, or by some other person to the drawer or indorser. Such is the presumption arising from the possession of the bill duly dishonored; and that must prevail until rebutted by proof.

This conclusion disposes of the case, and shows that there is error in the judgment upon the evidence demurred to.

Judgment reversed, and remanded.

THE STATE v. CHAMBERS.

1. To constitute the offence of larceny, by entering into and stealing from a dwelling house, out house, &c. there must be an entry against the consent of the owner, unless the crime be meditated at the time of a permissive entry.

Novel and difficult questions.

The prisoner was indicted and tried at the circuit court of Tuskaloosa, for entering a dwelling house and stealing therefrom, twenty-five dollars in bank notes. It was proved that the prisoner had stolen the money described in the indictment, from the prosecutor, and from his dwelling house. That at the time of the larceny, the prisoner was a hireling, and lived in the house of the prosecutor. The prisoner, by his counsel, asked the court to charge that these facts would not support the indictment, which the court refused, and charged the jury, that if he entered the house and committed a larceny therein, he was guilty, notwithstanding he was a boarder and lodger in the house.

THE ATTORNEY GENERAL, for the State—referred to the 12th Ann C. 7; and the 7 and 8 Geo. 4th C. 29, which he insisted did materially vary from the statute of this State, to show that the offence might be committed by a lodger in the house; also, to 2 Leach, 564, 645; 1 Russ. and Ryan's C. C. 417; 1 Moody, 89; 12 East, 634.

WHITFIELD, *contra*—insisted that the entry was a material part of the offence, and if that was lawful, the offence of stealing from a dwelling house, was not made out under the statute which required an entry, unless the entry in this case was with intention to commit the larceny—That the English statutes cited, were unlike ours in not requiring an entry into the house.

ORMOND, J.—The statute under which this indictment is framed, is as follows: "Every person who shall enter any dwelling house, store house, &c. and therein commit the crime of larceny, and be thereof convicted, shall be punished by imprisonment in the penitentiary, not less than three, nor more than six years."

The intention of this law was, to protect property under the sanction of the dwelling house or other depository mentioned in the act by making it more penal than ordinary larceny. To constitute the offence, there must be an *entry*, and we think it cannot be doubted that this entry must be against the consent of the owner, unless the crime be meditated at the time of such permissive entry.

The decisions under the English statutes, cited by the Attorney

General, have no application here. These acts do not require an entry as a constituent of the offence, and were evidently designed to protect the owner, not only against strangers, or such as were not entitled to access to the house, but also against the inmates of the house as servants and apprentices. Our act is evidently framed upon the supposition, that protection to property thus circumstanced, is only required against those who enter the dwelling house without the consent of the owner, or who obtain such consent with the design of committing the larceny. The entry, therefore, is an essential ingredient of the offence, and the court erred in instructing the jury to the contrary.

Let the judgment be reversed, and the cause remanded, to await a new trial of the prisoner, or until he be otherwise discharged by due course of law.

HARTLEY, USE, &c. v. CHANDLER, ET AL.

1. Whether an entry upon an execution docket be evidence or not, *per se*, the testimony of the clerk or his deputy, that it was genuine, and that he had no doubt but it correctly stated the day when an execution was returned, made it admissible.

WRIT of error to the Circuit Court of Perry.

This was a proceeding, by notice and motion, under the statute of 1819, at the suit of the plaintiff in error against Chandler, as sheriff of Perry, and his sureties, for the failure to return a writ of *fieri facias*, which issued from the circuit court of that county in favor of the plaintiff, and was placed in his hands to be returned (according to its mandate) three days before the sixth Monday after the fourth Monday in March, 1842. The allegation is, that the execution was not duly returned, &c. An issue was made up and submitted to a jury, who returned a verdict in favor of the defendant, on which judgment was rendered.

On the trial, the plaintiff excepted to the ruling of the court.

From the bill of exceptions, it appears that the plaintiff produced his execution, together with the execution docket kept by the clerk; in which there was an entry, stating that the *fieri facias* in question was returned the 6th of August, 1842, although the sheriff's indorsement of "no property found," was dated the 4th of May preceding.

The plaintiff also offered a deputy of the clerk, who testified that the entry on the docket was made by him; that he could not remember, without reference thereto, that the *fieri facias* was not in fact returned until the 6th of August. He believed it was not returned earlier, but his belief rested entirely upon the entry. When executions were returned, entries were made on a docket kept for that purpose, indicating the day of their return, and that he had no doubt the entry in the present case, stated the day of return truly. The spring term of the circuit court of Perry in 1842 was holden on the 9th of May.

Upon this evidence, the court instructed the jury, that it was not sufficient in law to entitle the plaintiff to a verdict.

H. Davis and E. W. Peck, for the plaintiff in error.

T. Chilton, for the defendants, cited 1 Phil. Ev. 289, 438; 9 Johns. Rep. 289.

COLLIER, C. J.—The counsel for the defendants has assimilated the entry upon the execution docket, to a mere memorandum made by a witness, to which he may refer for the purpose of refreshing his memory. But he insists that it cannot be made evidence by the statement of the deputy clerk, that the facts it affirms are all true, because it is his invariable practice to enter them truly.

By the act of 1812, the clerk of every court is required to enter in a docket or book kept for that purpose, a list of all executions issued by him, specifying therein the names of the parties, the amount of the judgment, interest and costs in such execution; the name of the person to whom it is delivered, to what county directed, the date when issued, and the return day thereof; and when the same is returned, shall, without delay, record it at large on the same page or folio, on which the execution is entered, and

shall constantly carry the book to the court of which he is clerk. [Clay's Dig. 144, § 8.]

This statute imposes upon the clerk an official duty, and the execution docket cannot with propriety be considered as a mere memorandum, kept for his own use. The Legislature never would have made a law for a purpose so useless, as far as it concerns the public. But we need not resort to construction on this point; for the clerk is directed to carry his book into court, and this indicates that it was intended for the inspection of those who were interested in being informed of the facts disclosed in it.

Whether the entries upon the execution docket are evidence *per se*, we need not inquire; but when aided by the testimony of the clerk or his deputy that they were genuine, and that he had no doubt but they correctly stated the day when executions were returned, we know of no principle of law which would render them incompetent evidence. Sometimes the American courts have even relaxed the stringent rule of the English common law, by admitting a private writing to go in evidence to the jury, in all cases where it was made by the witness at the time of the fact, for the purpose of preserving the memory of it; although at the time of testifying, he can recollect nothing further than that he had accurately reduced the whole transaction to writing. [See cases collected in note, 3 Greenl. Ev. 484.] So it has been held, where an agent made a parol lease and entered a memorandum of the terms in a book, which was produced; but the agent stated that he had no memory of the transaction, but from the book, without which he should not, of his own knowledge, be able to speak to the fact, but on reading the entry he had no doubt that the fact really happened; this was held sufficient. And where a witness, called to prove the execution of a deed, sees his own signature to the attestation, and says that he is therefore sure that he saw the party execute it, this is regarded as sufficient proof of the execution of the deed, although the witness adds that he has no recollection of the fact. [Greenl. Ev, 485, and cases there cited.] Surely, an execution docket is not entitled to less influence as evidence than a mere private writing, not made in virtue of a legislative requisition. Whether it be a record or not, the assistant proof adduced at the trial, made it very satisfactory evidence of the fact for which it was offered. It cannot be expected that a clerk, from whose court, perhaps, five hundred to one thou-

sand executions annually issue, should be able to state from his own recollection, even aided by his docket, the facts which the law requires there to be entered. And if the proof made in this case were adjudged insufficient, there must, in the nature of things, frequently be a failure of justice.

The judgment of the circuit court is reversed, and the cause remanded.

COVINGTON & REAVIS v. KELLY, USE, &c.

1. When a trustee, appointed under a deed of trust for the benefit of creditors, has placed the choses in action, assigned to him, in the hands of an attorney for collection, and the latter is garnisheed by a creditor of the grantor in the trust deed, no judgment can be rendered against him until the trustee has been brought before the court, and the trust deed declared invalid in a contest between him and the attaching creditor.

WRIT of error to the County Court of Sumter.

This suit was commenced by process of garnishment, sued out after judgment, by Kelly (suing for the use of Hair) against one Christian and Covington & Reavis, requiring them to answer what they were indebted to Pollard (the defendant to Kelly's judgment) the surviving partner of a mercantile firm, composed of himself and one Carr.

After a judgment *ni. si.* and a *sci. fa.* against Christian, he appeared and answered that the firm of Pollard & Carr executed a deed of trust to him, conveying certain real and personal estate, as well as choses in action due that concern, upon certain trusts which, from the peculiar condition of the case in other respects, need not be stated. A considerable portion of these choses in action, were placed by the trustees in the hands of Covington & Reaves, as attornies, for collection.

Covington & Reavis, the other garnishees, did not answer jointly, but Reavis, one of them, answered that he had no effects

or monies in his hands belonging to the defendant in the judgment, nor was he indebted to him in any manner, at the time when the garnishment was served; that Christian (the other garnishee) in October, 1840, placed in the hands of himself and Covington, as attorneys, for collection, a large number of claims, purporting to be due to Pollard & Carr, for which claims a receipt was given by them to Christian, as one of the assignees of Pollard & Carr.—That as attorneys, they had received about $4,500 on said claims, and paid the same over to Christian; of the amount paid, $500 had been paid over since the service of the garnishment. He further answers, that with the exception of the effects held by Christian in trust, for the creditors of Pollard & Carr, he knew of none having effects of their's in hand.

It was agreed that this answer should be considered as filed at the return of the garnishment, and taken as the answer of Covington, and stand on the same ground as if made by him.

Upon these answers, an affidavit was filed by Hair, alleging that they were incorrect, and that the deed of trust therein mentioned, was null and void. He thereupon prayed that an issue should be made up to try the fact. All the garnishees, Covington & Reavis, as well as Christian, denied that the deed of trust mentioned in their several answers, was null and void. It was agreed that this issue, and the answers to the several causes, to apply to all the cases in which Pollard was defendant in attachment. And thereupon, the plaintiff voluntarily dismissed his proceeding as to the garnishee, Christian. The issue was then submitted to the court as a question of law, upon the face of the paper; and to sustain it, the plaintiff showed the deed of trust. The court held the deed to be fraudulent upon its face and void at law.

Covington & Reavis moved to be discharged, notwithstanding this judgment upon the effect of the deed, which the court refused.

They then moved to be discharged upon their answer, on the ground that the plaintiff had voluntarily dismissed his proceeding as to Christian. This was also refused, and the court then rendered a judgment against Covington & Reavis for $500, in favor of the plaintiffs.

The assignments of error question the regularity of this judgment, under the circumstances disclosed by the record, as well as upon the deed itself.

REAVIS, for the plaintiffs in error.
HAIR, *contra*.

GOLDTHWAITE, J.—This case is so entangled by connecting it with proceedings against other parties, that it is somewhat difficult to present a distinct understanding of the questions upon which our decision will turn.

Covington & Reavis and Christian, are jointly summoned as garnishees; but by their several answers, we ascertain that there is nothing like a joint liability to the debtor, whose effects are sought to be attached in their hands.

Covington & Reavis are liable immediately to Christian, upon their receipt, although that was given to him in his character of trustee, under the deed which is attacked as fraudulent; when, therefore, their answer disclosed this fact, Christian was shown to be the only proper party to litigate with the plaintiff, the questions arising upon the trust deed. It is not disputed, that as soon as the trust deed is out of the way, by reason of its being adjudged fraudulent, that any creditor of the grantors might attach the monies in the hands of the trustees; or even before, and afterwards await the judgment of the court upon that question. [Hazard v. Franklin, 2 Ala. Rep. 349.] Previous to the statute, which we shall presently consider, the legal effect of such a deed could be inquired into in a direct proceeding against a garnishee; and our impression is, that there would be no difference whether the garnishee was the trustee, or was one indebted to him in that character.

However the latter matter may be, it is certain that the trustee and those claiming under the deed would not have been, necessarily, concluded by a judgment against a garnishee answerable to them. It was, most probably, in regard to this difficulty that the act of 1840 was enacted. That provides, "that when a garnishee, in any case of judicial or original attachment, shall answer, that previous to the time of such answer, he or she shall have received notice of the assignment of the debt or property, in respect to which the garnishment issued, it shall not be lawful for the court to render judgment against the garnishee on the ground of the invalidity of the assignment of the debt or property; but the court before which the garnishment is pending, shall suspend the proceedings against the said garnishee, until the question is litigated,

as is provided for in the following section of the act." The other sections of the act provide for the manner in which the party who claims to have the interest in the debt or property shall be brought before it; and only permits a judgment to be rendered against the garnishee after the question of right is determined against him who claims to have it.

It is evident this statute is highly remedial, inasmuch as it relieves the garnishee from the liability to contest the same questions of law or of fact with the plaintiff in the garnishee proceeding, and, afterwards, with the person claiming the right; and, therefore, it ought to receive a liberal construction.

In this case, it is not pretended that the trustee has transferred the debt, but the garnishee is sought to be charged as having moneys in his hands which, in point of law, belong to the debtor, as whose effects it is sought to be attached. The answer shows that this debt has been transferred to another, or that such is the legal result if a particular deed is valid in law. In our opinion, this is within the spirit of the enactment, even if it is not within the very letter.

Let us, then, examine the agreement of the parties, to ascertain if a presumption can properly be drawn therefrom, that these garnishees intended to waive the protection of the statute, and take upon themselves the risk of being compelled again to litigate the same questions with the trustee.

It will be perceived that the plaintiff asserts not only that the deed of trust is null and void, but also, that the answer is incorrect; it was the latter part of this allegation which enabled him to have an issue made up with Covington & Reavis. Christian, the trustee, although before the court as a garnishee, was not before it in the character of a claimant of the debt due from Covington & Reavis; and no notice to him, under the statute, was ever issued. It is possible, if he had continued before the court, we might properly have inferred that he waived the notice required to be given by the statute, and was bound by the agreement. But, instead of this, he is voluntarily dismissed as one of the garnishees in the cause, and no proceedings are afterwards taken against him. Conceding that this dismission only affected him as a garnishee, it does not make the subsequent judgment against Covington & Reavis regular; for no judgment could be

rendered against them until the question of right to the money had been determined as between the plaintiff and Christian.

Our conclusion is, that the proceedings were so irregular that the judgment cannot be sustained. It must, therefore, be reversed, and the cause remanded, in order that the plaintiff may, if he chooses, proceed to bring the trustee, Christian, before the court, by notice, as the claimant of the debt alleged subject to be attached as the effects of the debtor by the judgment.

It will be seen that we have avoided all reference to the legal questions arising out of the deed of trust. This is not because we have any doubt upon them, but because the present parties are not competent to litigate them.

Judgment reversed, and cause remanded.

THE STATE v. HINTON AND WATSON.

1. The crime of adultery consists in the illicit intercourse of two persons of different sexes, one of whom at least is married, and includes the crime of fornication. Upon an indictment for adultery, therefore, it is not necessary to allege that either of the offending parties were married. The term "adultery" implies the offence without the allegation of any other fact.

Error to the Circuit Court of Dallas.

Novel and difficult questions.

The defendants were indicted for living together in adultery and fornication. The first count charges that the defendants "lived together in adultery;" the second, "that they lived together in fornication."

The jury having found the defendants guilty, they moved in arrest of judgment, because the charge in the indictment was too general, and because the finding was general on both counts, for distinct offences. The court overruled the motion, but referred the questions of law arising thereon for the consideration of this court, as novel and difficult.

THE ATTORNEY GENERAL, for the State—cited Arch. C. Pl. 61; 4 Porter, 186; 5 id. 33; 8 Wend. 211; Bouv. Law Dic. 2 Dall. 124; 1 Yeates, 6; 5 Rand. 634; 2 Bailey, 149.

G. W. GAYLE, *contra*—cited 4 Pick. 500; 4 Porter, 397; 3 Stewart, 123.

ORMOND, J.—The objection taken to the first count of the indictment is, that it should have been alleged that one of the offending parties at least, was married. We do not think it was necessary. The crime of adultery consists in the illicit commerce of two persons of different sexes, one of whom at least, is married, and includes the crime of fornication. The term itself imports the offence without the allegation of any other fact.—The indictment was therefore sufficient.

The finding of the jury on both counts, cannot possibly prejudice the defendants, as the offence charged in the second count is included in the first. Let the judgment be affirmed.

ADAMS' ADM'R v. TORBERT.

1. Where a promissory note, payable in Bank, is transferred by indorsement, after maturity, to entitle the indorsee to charge the indorser, he should demand payment of the maker within a reasonable time after he became the proprietor of the paper, and if refused, give notice of non-payment to the indorser: and the insolvency of the maker at the time of the transfer will not excuse the indorsee's neglect thus to proceed.

WRIT of error to the Circuit Court of Marengo.

This was an action of assumpsit by the plaintiff in error, against the defendant. The declaration, so far as it is necessary to notice it, alleges that J. B. Wilkins, on the 31st of May, 1834, made his promissory note for the sum of seven hundred and ninety-one dollars and ninety cents, payable on the first day of Janua-

ry next thereafter, to James A. Torbert or order, at the Branch of the Bank of the State of Alabama at Mobile. On the 9th of February 1836, the payee died intestate, and administration of all his estate was granted to the defendant, who, as such administratrix, indorsed and delivered the note in question to the intestate of the plaintiff. Afterwards the same was duly presented to the maker for payment, which was refused; thereupon, it was protested—of all which the defendant had due notice, &c.

The cause was tried by a jury as on issue joined, but on what plea, the record does not inform us. A verdict was returned for the defendant, and judgment was rendered accordingly. On the trial, the plaintiff excepted to the charge of the judge to the jury. It was proved that the note came to the possession of the defendant as administratrix of the payee after the same was due; that in 1837, she indorsed and delivered it for a consideration moving to herself; that in less than six months after the indorsement it was presented several times to the maker for payment, who refused to discharge it. On the 16th of August, 1841, the note was again presented to the maker for payment, and upon payment being refused, it was protested for non-payment, and notice thereof given to the defendant.

Evidence was adduced by the plaintiff tending to show that the maker was insolvent at the time the indorsement was made; that soon thereafter he became notoriously insolvent, and still continues so.

Upon this evidence the court instructed the jury, that the presentment of the note for payment, and notice of non-payment to the defendant, was not sufficient to charge her; that the insolvency of the maker would not excuse a due presentment to him, and notice thereof to the defendant; and that the plaintiff was not entitled to recover.

L. Clark, for the plaintiff in error.—The insolvency of Wilkins is a sufficient excuse for not giving notice of a demand, and refusal by him to pay the note, at an earlier day. [2 H. Bla. Rep. 336, 609; 2 Caine's Rep. 343; 4 Cranch's Rep. 141; 11 Johns. Rep. 181; 3 Ala. Rep. 648.]

F. S. Lyon, for the defendant.—There is no pretence that the note was fraudulently indorsed by the defendant. For any thing shown to the contrary, her indorsees were as well informed of

Wilkins' situation as herself. In fact the proof does not show he was certainly insolvent at the time of her indorsement. Although the note was transferred after it became due, reasonable diligence was necessary in making demand and giving notice, in order to charge the defendant.

COLLIER, C. J.—Upon the death of the payee and the grant of administration to the defendant, the legal interest in the note in question vested in her, and it was competent for her to transfer it by indorsement. The fact that it was past due, did not render the assignment irregular, or in any manner affect the right of the indorsee to demand its payment of the maker. [Chitty on Bills, 9 Am. Ed. 242; *et post.* "The fact, that the note was over-due when negotiated, did not dispense with a demand and notice. It is the duty of an indorsee to demand payment of the maker within a reasonable time after the transfer to him of paper, and if refused, to give notice of non-payment to the indorser. The undertaking of the indorser is made upon these conditions, and unless they are performed, it cannot be absolute, so as to entitle the holder to his action against him; and in this respect, there is no difference between paper indorsed before, and after it is due."—Such is the language of this court, in Kennon v. McRea, [7 Porter's Rep. 185–6.] and the cases there cited, very satisfactorily sustain the doctrine as we have stated it.

We do not understand that the plaintiff denies these principles, but he insists, that as the maker of the note was insolvent at the time of the indorsement, and has been ever since, that, therefore, the defendant has not been prejudiced by the want of notice of a demand and refusal to pay, and cannot insist upon the want of it, as a defence to the present action. It is laid down generally, that whenever a party to a bill is entitled to his remedy over against another party, either on the bill or otherwise, as he may be prejudiced by the delay in giving him notice of the dishonor, he is therefore entitled to it. It has, therefore, been held, that the drawer of a bill is entitled to notice of its dishonor, although he knew that it would not be paid by the acceptor, provided he had any reason or right to expect that it would be paid by any other person, or he have any remedy over against such person. [Chitty on Bills, 9 Amer. ed. 471.] Again: "the known insolvency of the drawee or acceptor, or maker of a note, or his being in

prison, or the notorious stopping payment of a banker, constitute no excuses, either at law or in equity, or in bankruptcy, for the neglect to give notice of non-acceptance or non-payment; because many means may remain of obtaining payment by the assistance of friends or otherwise, of which it is reasonable that the drawer and indorsers should have the opportunity of availing themselves, and it is not competent to the holders to show that the delay in giving notice has not in fact been prejudicial." [Id. 482.] Parties are entitled to have the chance offered them of making what they can of those who are liable over to them, and if they are abridged of it, the law which is founded upon the usage and custom of merchants, says they are discharged. [Rhode v. Proctor, 4 B. & C. Rep. 517.]

In DeBerdt v. Atkinson, [2 H. Bla. Rep. 336,] it was held, that if the payee of a note lend his name and indorse it, merely to give it credit, and enable the maker to raise money upon it, and knows at the time that the maker is insolvent, this is not a fair transaction, and he is therefore not entitled to notice; and it is no defence for him, that the note was not properly presented for payment. This decision has been often disapproved of. Mr Chitty considers it as erroneous, because the indorser upon paying the note, would have a clear right of action against the maker. In French v. The Bank of Columbia, [4 Cranch's Rep. 164,] the case was remarked upon, and the court say, "In point of reason, justice and the nature of the undertaking, there is no case in which the indorser is better entitled to demand strict notice, than in the case of an indorsement for accommodation, the maker having the value. Chief Justice Kent notices the principle determined in DeBerdt v. Atkinson, and says, "The same point was afterwards ruled by Buller, Justice, at *nisi prius*. [1 Esp. Rep. 303.] But within two years subsequent to the first decision, the same court of C. B. decided directly the contrary, in the case of Nicholson v. Gouthit, [2 H. Black, 609.] We think the reasoning in the last decision the best, and ought to be followed." *Further:* "An indorsement for the credit of the drawer, and without receiving value, is not unusual in the ordinary course of business, but it would be inconvenient and injurious, to dispense with the settled rule of the previous demand and notice in all such cases. It is no doubt the general understanding of the parties, when negotiable paper is indorsed, that the legal consequences shall at-

tach to that indorsement." [2 Caine's Rep. 344–5.] In Agan v. McManus, [11 Johns. Rep. 182.] it was holden that the doctrine applicable to waiver of notice of the dishonor of bills of exchange, does not apply to promissory notes; and it seems now to be settled in England, that if such not ce in the ordinary course of business, can be dispensed w.th in any case, it is only where the insolvency of the maker was known at the time of the indorsement. In the case last cited, the court do not intimate that the known insolvency itself would d.spense with the necessity of a demand and refusal; what was said upon that point, was merely intended to show, that such a case was not concluded by the generality of the remark. And we think, it abundantly appears by the law as cited from Chitty on Bills, that the insolvency of the maker cannot excuse the want of notice to the indorser; and whether the indorsement was made for value paid to him, or for the accommodation of the maker, is wholly immaterial. [See Barton v. Baker, 1 Serg't & R. Rep 334.]

The note on which this action was brought, is made payable at bank, and under our statutes in respect to such securities, is "governed by the rules of the law-merchant, as to days of grace, protest and notice." [Clay's D.g. § 11, 13. 17.] This being the case, the authorities c.ted are strictly applicable.

The facts show that notice of the non-payment of the note was not given to the defendant until nearly four years had elapsed after its indorsement by her; and the only excuse urged for this neglect, was the insolvency of the maker. This we have seen did not warrant the omission. If the facts had been presented to the court upon a demurrer to the evidence, the court should have rendered a judgment for the defendant, and we think it was authorised to instruct the jury in such a manner as to produce the same result.

Milton v. DeYampert, [3 Ala Rep. 648.] which was cited by the plaintiff's counsel, is entirely unlike the present. There, the note was not indorsed by the payee or other legal proprietor; but by one who was a stranger to it; and it was consequently holden that the ordinary rules applicable to indorsers, did not control the defendant's liability.

Without adding any thing more, the judgment is affirmed.

LAMBETH AND WIFE v. GARBER, ET AL.

1. A report by the administrator, that the estate represented by him is insolvent, is necessary to give the county court jurisdiction to decree against him in fafor of creditors: and a report of insolvency made by a previous administrator, has no effect on on a subsequent administrator, *de bonis non.*

WRIT of error to the County Court of Sumter.

This is an administration cause, and the decree complained of is one made on the final settlement of the estate of Pleasant M. Posey, deceased.

In July, 1840, administration of the estate of Pleasant M. Posey, was granted to Catharine Posey. She resigned the trust in August of the same year, without proceeding upon the administration. Upon her resignation, James Hair was appointed.—Hair, after proceeding in the administration so far as to obtain an order of sale of some real estate, upon his petition setting out that it could not be fairly and beneficially divided among the heirs at law, reported the estate insolvent on the 22d September, 1842. On the 10th of November of the same year, Hair resigned the administration, and Mrs Posey was re-appointed and entered into a new bond. On this administration, an inventory of the estate was returned. At June term, 1843, an application was made by one Williams, for a citation to William Lambeth, who had intermarried with the administratrix, and his wife, to settle the said estate.

A citation was issued to Lambeth and wife on the 26th of June, 1843, to appear before the court and settle the said estate, but it does not recite at whose instance, or for what cause, it was issued. They appeared at the July term, and asked for further time, which was allowed them until the 4th Monday of September then next: At the same term, a citation was ordered against Hair, the former administrator, to appear and settle his accounts. At the September term, Lambeth and wife appeared and filed their account current and vouchers, and the court thereupon ordered that the 4th Monday of November then next, should be set apart for the final settlement of the estate; and publication was then order-

ed, giving at least 40 days notice for all persons in adverse interest, to appear and contest the same. In the account current filed, the parties debited themselves with seven slaves, six of which were stated as purchased by Mrs Lambeth, while sole administratrix, with a note belonging to the estate: And credited themselves with the same slaves as remaining in their possession. They also disclosed the names of the several distributees of the said estate, who were all minors.

The court then proceeded to state an account with the administratrix, which need not be recited, as the opinion of the court does not proceed upon it. In this account was included the accounts of unpaid creditors amounting to $1940 36, and judgments were rendered in their favor severally, for the amounts ascertained by the court to be due them against Lambeth and wife, for which sums so decreed, execution was ordered to issue.

The writ of error is sued out upon this final decree, and one of the errors assigned (the only one upon which the opinion of the court is given) is, that the county court had no jurisdiction to render these judgments in favor of the several creditors.

Smith, for the plaintiff in error.
Peck, *contra.*

GOLDTHWAITE, J.—There is in this case, an error which goes to the entire settlement, and which renders it improper to determine any other question raised upon the record.

It appears that the estate has never been represented insolvent by the present representative, and such a representation, in our opinion, is absolutely essential, to give the county court jurisdiction to decree in favor of creditors. This subject was examined at some length in Clark v. West, [5 Ala. Rep. 117,] and there we endeavored to show that the peculiar jurisdiction exercised over insolvent estates, arises out of, and is dependant upon the report of the administrator. This case differs from that, in the circumstance, that a previous administrator had so reported, and afterwards resigned before any settlement with the county court; this circumstance does not change the legal aspect of the case. The general course of decision has been to consider each administration as entirely distinct from any other; and accordingly it has been held that an administrator *de bonis non*, could

maintain no action against the representatives of the previous administrator for assets of the estate received by him. [Chamberlayne v. Bates, 2 Porter, 550.] So, likewise, as to a suit upon the official bond, for the benefit of the administrator *de bonis non.*—[Judge County Court v. Price, 6 Ala. Rep.] In Thomason v. Blackwell's adm'rs, [5 S. & P. 181,] and Driver v. Riddle, [8 Porter, 343,] it was held, that an administrator could not, by resigning the trust, discharge himself from a suit in progress against him, without showing an administration or want of assets.

It it true, in Chamberlain v. Bates, the court express the opinion that the decision then made would not necessarily determine that a report of insolvency, by an administrator *de bonis non,* might not draw to the jurisdiction of the county court the settlement with the previous administrator, or his personal representative. Whatever may be the proper course of practise in that case, it is not the one presented by this record; but here the administrator *de bonis non* is sought to be charged by reason of an act with which he has no connexion, and over which he could exercise no judgment or control. The right of contesting demands asserted by creditors is one of great importance to those who are entitled to distribution; and, when the estate is solvent, the administrator is alone authorised to act upon them. When the estate is insolvent, the distributees cease to have any interest in it, and instead of a representative in their behalf, the law has very wisely substituted the judge of the county court or commissioners, to determine on the claims presented as between the several creditors, and the administrator has no voice in the matter, except to render a true account of the assets. We may remark that the law will not permit one administrator to be bound by the admissions of his co-administrator. [Caruthers v. Mardis, 3 Ala. Rep. 599.] Here, the attempt is to bind one by an antecedent act of another, which seems to fall within the same principle. The only doubt we have in this case, has been from the supposed influence it might have upon the bar presented by the statute of *non claim,* and the questions therewith connected; but it does not seem to follow that the bar would not attach to the first grant of administration, or that a presentation of the demand to the first administrator would not avoid the bar. These matters seem to have been somewhat considered in Hazard v. Purdom, [3 Porter, 43,] but no decision was made upon them.

Upon the whole, we are of opinion that the judgment of final settlement must be reversed for the error in rendering judgment in favor of the unpaid creditors.

Judgment reversed and remanded.

WEAVER & GAINS v. CRENSHAW.

1. The right of a freeholder to be sued in the county of his residence, is a personal privilege, and cannot be pleaded by any other party to the suit; therefore, a joint plea by two defendants, one of whom is liable to the suit, is bad.
2. Until dower is assigned to the widow, she has no estate in the lands of her husband, but a mere right to occupy the mansion house, out houses, &c. until dower is assigned her.
3. Whether an estate in dower would entitle the second husband to an exemption from suit, out of the county of his residence, *Quere?*
4. A joint judgment against two defendants, one upon verdict, and the other by *nil dicit*, is regular.

ERROR to the County Court of Perry.

Debt on note executed by the plaintiffs in error and one Bradley. A writ issued against all the parties; and also a branch writ to Dallas county. The sheriff of Perry returned the writ executed on the plaintiffs in error, and "not found," as to Bradley.

The defendant Gains pleaded that he was a resident freeholder of Dallas county, and not liable to a suit in Perry county.

The defendants jointly pleaded the freehold of Gains in the county of Dallas.

Upon the first plea, issue was taken; and to the last, there was a demurrer, which was sustained by the court.

Upon the trial of the issue, the defendant Gains, to establish his freehold in Dallas county, proved that he resided in that county, upon land which had belonged in fee to his wife's former husband, but did not prove that dower had been assigned her. The court instructed the jury, that this was not such a freehold in the

defendant as would protect him from suit out of the county of his residence; to which the defendant excepted.

Judgment being rendered against the defendants, they now assign these matters as error.

DAVIS, for plaintiff in error.
T. CHILTON, *contra.*

ORMOND, J.—The joint plea of the defendants that one was a freeholder in Dallas county, and not liable to an action in the county of Perry, was bad, and the demurrer to it properly sustained. The right to plead this fact in abatement is personal to the party, and did not affect the right to sue the other defendant in Perry county. As a joint plea it was therefore bad, and the demurrer to it properly sustained.

Until dower is assigned to the widow, she has no estate in the lands of her deceased husband. The widow's *quarantine*, by our statute, does not extend beyond the right to occupy the dwelling house, out houses, &c., until her dower is assigned.—Until then, she has no estate in the lands of her deceased husband, but a mere right to have her dower allotted to her. It is not necessary, therefore, that we should enter upon the inquiry whether a dower interest in lands would entitle the husband to an exemption from suit out of the county of his residence, because it does not appear that there was any such estate in the wife of the defendant.

The joint judgment against the defendants, one upon *nil dicit*, and the other upon verdict, is sufficiently regular.

Let the judgment be affirmed.

TURNER, ET AL. v. LAZARUS.

1. One joint maker of a promissory note cannot be called as a witness for the other with whom he is sued, although he makes no defence to the suit; for a verdict in favor of his co-defendants, would operate a discontinuance of the action, and even vacate the judgment if one had been rendered against him.
2. A plea which denies that two of the defendants made and delivered a promissory note with others, whose names appear as joint makers, need not be verified. Such a plea, if true, does not disclose matter which is available as a defence.

WRIT of error to the County Court of Sumter.

This was an action of assumpsit at the suit of the defendant in error, on a promissory note, dated, Sumter county, Ala. May 15, 1839, made by Elihu Moffitt, H. G. Turner, H. T. Stanton, and by Elihu Moffitt and Landon J. Morris as partners, by the name and style of L. J. Morris & Co., for the payment of twenty-five hundred dollars, negotiable and payable at the Branch of the Bank of the State of Alabama at Mobile, nine months after date.

Turner and Stanton pleaded, 1. *non assumpsit.* 2. That they never made and delivered the promissory note in the plaintiff's declaration, mentioned in manner and form as the plaintiff has alleged. 3. That they did never make, execute and deliver, the promissory note declared on, with L. J. Morris, or L. J. Morris & Co. or with him or them promise, in manner and form as the plaintiff has declared against them. All these pleas were verified by the affidavit of the defendant Turner, and the cause submitted to a jury on issues thereto.

On the trial it was shown that Turner and Stanton were the only defendants who made defence, and thereupon they released their co-defendant, Morris, from all liability to pay or contribute to the payment of any judgment that might be recovered against them in this suit; further, they offered to show that since the preceding term, he had been discharged by decree and certificate in bankruptcy, under the laws of the United States, from all his debts, including the note in suit. Thereupon, they proposed to examine Morris as a witness on their behalf, to prove that the signature of Turner and Stanton to the note when it was passed to plaintiff,

was with the knowledge of the latter, applied to a purpose different from that for which it was intended by them when it was made, and without their knowledge or assent. The plaintiff objected to the introduction of Morris, on the grounds that he was a party to the record, and interested in the suit; thereupon, the court ruled that he was incompetent, and rejected him; and the defendants excepted.

It is further shown that the plaintiff produced the note declared on, and proved the hand writing of the persons whose names appear as subscribers to it, with the exception of L. J. Morris & Co. Turner and Stanton requested the court to charge the jury, that under the several issues, especially that to the last plea, it was incumbent on the plaintiff to prove the hand writing of L. J. Morris & Co.; which charge was refused, and the jury were instructed, that such proof was unnecessary. And the defendants Turner and Stanton again excepted, and their bill of exceptions is duly certified to this court. A verdict was returned against them, and a judgment was rendered thereon. Moffitt died pending the suit, and as to him it abated; and Morris failing to make defence to the action, a judgment by default was entered against him.

Bliss & Baldwin, for the plaintiff in error—insisted that Morris was a competent witness, that he had made no defence, and not having done so at the appearance term, he forfeited all right to gainsay the action. [Clay's Dig. 334, § 116.] As to him, then, the plaintiff was entitled to a judgment, whatever disposition might be made of the cause, as to his co-defendants. [Clay's Dig. 323, § 61, 63; 324, § 64.]

Morris was also released by bankruptcy, as well as by the release which was executed to him by Turner and Stanton, and was not consequently liable to them in any event. The mere fact of his being a party to the record in the absence of all interest, does not disqualify. [Greenl. on Ev. § 355, 357; 4 Dallas' Rep. 137; Norris' Peake, 225; 6 Leigh's Rep. 246; 4 Taunt. Rep. 152; 1 Root's Rep. 134, 489; 7 Bing. Rep. 395; 1 Peters' Cond. Rep. 209; 2 id. 312; 6 Monr. Rep. 304; 2 Phil. Ev. C. & H's Notes, 134–5–6, 144.]

The form of the issue upon the last plea, required the plaintiff to prove the signature of L. J. Morris, & Co.

ANDERSON, with whom was MANNING, for the defendant, insisted upon the incompetency of Morris as a witness. 1. Because he was a party to the suit, and liable to a judgment jointly with his co-defendants. 2. If his co-defendants should be successful in their defence, a judgment against him could not be supported, but the entire action would be discontinued. [1 Chitty's Plead. 34; Greenl. on Ev. § 356.] 3 The witness was liable for the costs, and he could not relieve himself from their payment by giving evidence that might produce such a result. [1 Phil. Ev. 74.] 4. His certificate of bankruptcy was not pleaded, and could not have been regarded by the county court for any purpose. 5. The release of Turner and Stanton cannot make Morris a competent witness against the plaintiff.

[He cited 7 East's Rep. 437; 2 Starkie's Ev. 204, notes; 3 Camp. Rep. 282; 2 id. 333; 2 J. J. Marsh. Rep. 508; 1 Phil. Ev. 74; 1 Wend. Rep. 119; 2 Verm. Rep. 138; 8 Taunt. Rep. 139, 140; 4 id. 752; 10 Wheat. Rep. 384; 18 Johns Rep. 477–8, 480; 4 Eng. C. L. Rep. 397; 4 Wend. Rep. 456; Clay's Digest, 334, § 116.]

Stone v. Gover, [1 Ala. R., N. S., 291.] shows that this court will not reverse the judgment, because it was not proved that L. J. Morris & Co. executed the note, together with Turner and Stanton. If such proof was necessary, the recital in the body of the note of the firm name, would be sufficient *prima facie* evidence, as against their joint promissors, that they subscribed it.

COLLIER, C. J.—Placing all other considerations out of view, and the incompetency of Morris as a witness, may be rested upon the ground that he was sued jointly with those for whom he was called on to testify, as the makers of a promissory note.—

True, the act of 1818, declares, that every promissory note, &c. shall be construed to have the same effect in law as a joint and several note, &c. and makes it lawful to sue out process, and proceed to judgment against any one or more of the makers. And where a writ shall issue against any two or more joint makers of such note, it is competent for the plaintiff after its return, to discontinue his action against any one or more of the defendants, on whom the writ shall not have been served, and proceed to judgment against those on whom it shall have been executed. [Clay's Dig. 323, § 61, 62.] This statute has never been held to author-

ise a judgment against one joint maker of a note where all of them have been brought before the court by the service of process. It permits a less number to be sued, and allows a discontinuance as to those on whom the writ has not been executed; beyond this it does not modify the common law as it relates to the case before us.

Even suppose a judgment by default had been obtained against Morris, before he was offered as a witness for his co-defendants, and upon the trial of the issue they were successful, the effect of the verdict would be to vacate that judgment and operate a discontinuance of the action. Morris then was called to produce a result by his evidence, which would have led to his discharge from the suit. He was consequently an interested witness, and rightly excluded. Such was the decision even where the co-defendant, who was offered as a witness, had been defaulted, in Pilsbury v. Cammett, et al., [2 N. Hamp. Rep. 283. See also, Bradlee, et al. v. Neal, et al. 16 Pick. Rep. 501; Scott v. Jones, 5 Ala. Rep. 694.]

It is enacted by a statute of this State, that the writing on which any suit shall be brought in the courts of this State, shall be received as evidence of the debt or duty for which it was given; and the defendant shall not deny the execution of the same, unless it be by plea supported by affidavit. [Clay's Dig. 340, § 152.] The third plea of the defendants, Turner and Stanton, does not deny that they subscribed the note in question as makers, it impliedly admits such to be the fact; but it alleges that they did make and deliver it with L. J. Morris, or L. J. Morris & Co.—This is clearly not such a plea as the statute requires should be verified by affidavit. It sets up an immaterial fact as a bar to the action; immaterial we say, because it does not amount to a denial of the execution of the writing, and whether true or false, cannot have any influence upon the liability of the defendants who pleaded it. Whether L. J. Morris & Co. simultaneously subscribed the note with Turner and Stanton form no criterion by which to adjust the legal liability of the respective makers. If their names were placed to the paper after it had become operative, its binding efficacy as to the previous parties to it, would not be in any manner impaired; and it would not be less valid as a note. This being the case, that part of the act which makes the writing on which a suit is commenced, evidence of the debt or

duty, would apply and dispense with other proof, until counter-vailed by testimony adduced by the defendant.

This view renders it unnecessary to consider what would be the effect of Stone v. Gover, [1 Ala. Rep. N. S. 287,] upon the last plea, or what evidence it requires on the part of the plaintiffs. It results from what has been said, that the county court laid down the law correctly—its judgment is consequently affirmed.

DOWNMAN v. FROW & FERGUSON.

1. Evidence of what was said in certain conversations between a defendant in execution and one who afterwards, during the same day, purchased a slave sold by the sheriff, is admissible, when the object is to show that the purchase was made on account of the defendant.

WRIT of error to the Circuit Court of Dallas.

Claim of property in a slave levied on by an execution at the suit of Downman against one Tredwell, and claimed by Frow & Ferguson.

At the trial, the claimants, to make out their claim, proved that they held the slave as trustees of a deed executed by one Parkman; and to prove Parkman's title to the slave, they offered a witness, who swore, that before the lien of Downman's execution attached, the slave had been sold under execution as the property of Tredwell, and bought by Parkman, who paid the purchase money (some 700 dollars) in cash. The plaintiff then produced a witness, who swore that he was present at that sale; that some time before the sale, but on the same day, he was present at an interview between Parkman and Tredwell, in which a conversation was had between them in regard to the sale; that Tredwell handed over one hundred dollars to Parkman; that during the same day, at several interviews previous to the sale, Parkman and Treadwell spoke of a buggy and a gold watch, then in the possession of the latter; that a few days afterwards,

this buggy went into the possession of Parkman, and the watch was sold by Tredwell to another person. None of these conversations were had at the sale, but were held at different times before it took place. The proceeds of the slave then sold was applied in part satisfaction of an execution then in the sheriff's hands against Tredwell.

The plaintiff then offered to prove, by the same witness, what was said by Tredwell and Parkman in these conversations before the sale, but on the same day, for the purpose of showing that Parkman bought the slave for Tredwell; but the court refused to permit the examination or let in the evidence, and the plaintiff excepted. This is now assigned as error.

G. W. Gayle, for the plaintiff in error, insisted that the evidence was competent as leading to an explanation of the act of purchase. [24 Pick. 242.]

Edwards, *contra*, argued that the offer was too indefinite for the court to act upon; it should have been shown what the declarations were, as otherwise the court will presume no injury was done. [1 Ala. Rep. N. S. 583; 1 S. & P. 81; 2 Porter, 32; 7 Cranch, 262, 270; 1 Leigh, 218; 3 Cowen & Hill's notes, 790.]

GOLDTHWAITE, J.—The rejected evidence was offered for the purpose of showing that Parkman bought the slave for Tredwell. It was requisite for the plaintiff to show further, that the effect of the purchase was to vest the title in him so as to be the subject of sale under this execution; but this could not be done until after it was ascertained that the purchase was made in the manner offered to be shown. It seems to us that the conversations had between Parkman and Tredwell previous to the sale, were competent evidence to ascertain the intention and object of the purchase by the former; and in this view, the evidence should have been admitted. Whether it would have been sufficient for the purpose, after the declarations were before the jury, is a matter which could not be known when they were rejected. It is not seriously mooted by the counsel for the defendant in error, that such evidence was competent; but the objection now urged against it is, that the court should, at the time, have been informed what the declarations were which the plaintiff proposed

to give evidence of. It is possible that the party may not have known the precise extent of the evidence which he expected to derive from the witness; but he certainly had a right to ask what was said respecting the contemplated sale, and whether Parkman admitted that he had received funds from Tredwell for the purpose of purchasing the slave. We only state this as illustrative to show that the party has the right to examine the witness, although he may not be able to state what the witness will answer. He offers a witness with the object in view of obtaining evidence of a particular kind; and this is all that is necessary to be stated previous to the examination.

We think there was error in rejecting the evidence offered; and for that, the judgment is reversed, and the cause remanded.

WEIR v. HOSS & WIFE.

1. A bill pf exceptions may be suppressed, when it is shown that it was fraudulently or surreptitiously obtained; but the Supreme court cannot try the facts and determine what was the point reserved at the trial, nor can any admission made by the judge afterwards, affect the validity of the bill.
2. A publication, the tendency of which is to expose the party to ridicule, contempt and disgrace, is, if maliciously or wantonly done, a libel.
3. The office of the *innuendo* is to explain the allusions to the party intended to be libelled, and if the allusions cannot be rendered certain without other matter, it must be placed on the record, by reference to which, the words complained of, become actionable. Its office is to explain—it does not introduce new matter.
4. When the *innuendo* explains the meaning of personal pronouns, the truth of the explanation is to be ascertained by the context.
5. When the libel had spoken of the plaintiff as the "Filly horse," and *innuendo* that the plaintiff's wife was meant, held to be correct—her name being *Hoss*.
6. It is not necessary to set out the entire publication charged as being libellous; unless, by the omission of some portions, a new arrangement is produced, and the sense altered. The proper mode is to show that the selected parts are extracts; and if the part omitted explains it, or renders it harmless, the defendant may have the benefit of it on the general issue.
7. When the plaintiff does not undertake to set out the libel in *hæc verba*, or ac-

cording to its tenor, the omission or alteration of a letter, which does not alter the meaning, will not be a variance.

8. When copies of a libel are offered in evidence, instead of the original, which are stated in the record to be *substantial* copies of the original, if the copies are not set out in the record, this court will presume, after verdict, that the variance between the copies and the original, was immaterial

9. To constitute a libel, it must be published as well as written, and if copies of the writing are taken without the consent of the author, the offence is not complete.

ERROR to the Circuit Court of Cherokee.

The action was by the defendants against the plaintiff in error for a libel.

The first count of the declaration charges, that the plaintiffs were tavern keepers in the town of Jefferson, and liberally patronized as such, and that the libel was published to injure their good character, &c., and to cause persons who patronized their tavern to withdraw their patronage, &c., the defendant himself being a tavern keeper in the same town; that "he published of and concerning Sarah Hoss, wife of said Jacob, a certain false, scandalous and defamatory libel, containing among other things too vulgar and obscene to be mentioned, the false, scandalous, malicious and defamatory matter following, of and concerning the said Sarah:

"She, (meaning the said Sarah), I am told, visits Mrs. Burnett's, alias Haden—decent company for decent folks, if, but as some folks say, they soot very well. I (meaning the defendant) think so—such lady ought to establish a hore house. They (meaning Mrs. Burnett and the said Sarah Hoss) would make good street hores. Oh, delightful woman!" * * *

The second count, omitting the statement of an intention to injure the plaintiffs as tavern keepers, charges the libel thus: "To the public, and more especially the ladys, know, as it is well known, that Mrs. Hoss (meaning the plaintiff Sarah) is getting along in the world; as concerns talking about her neighbors, and more especially those she should not, for whenever sutch folks getting to spinning street yarn, they should look at home first, and see if they have all things clean in the first place. I (meaning the writer) do not like to hear of ladys who wish to be fine and decent in this place—they should not befriend such a man

as J S. Burnett, who has taken other men's wives. I understand she (meaning the plaintiff Sarah) says he (meaning the said J. S. Burnett) has done write. It is very likely he has done well, but married folks should not hold up for them." * * *

After re-stating the libellous matter in the first count, it proceeds: "If the old horse (meaning the plaintiff, who was then absent from home,) does not come home soon, they (meaning the said Sarah and others) will have to crisen that little J. S. Burnett, (meaning and insinuating thereby, that the child of the said Sarah, then lately born, was illegitimate, and was the child of the said John S. Burnett.) * * * * In the first place, ladys should keep their tongues, then down with their petticoats, and pin them down; but she (meaning the plaintiff Sarah) lets hers fly up. * * * * *

I had a notion of establishing a printing office here; but it would be useless, for aunt T. and filly horse (meaning by aunt T., Mrs. Tennessee Leach, the sister of plaintiff Sarah, and by filly horse, the plaintiff Sarah,) would take all the bizness, and it would be a bad bizness for me. * * * * * *

Now, young ladys, you had better leave off going there; for if you do not, you will get a bad name, and then as to marrying, it will be a bad chance," (meaning that young ladies should desist from visiting the tavern house, and residence of the plaintiffs, for fear of losing their reputation,) &c. &c.

The defendants demurred to the declaration, and the court overruled the demurrer.

Upon the trial, under the general issue, it appears from the bill of exceptions, that the plaintiffs proved the loss of the original libel; and then proved three copies of it; each of which was proved to be a substantial copy of the original libel; and all of which differed from each other in some respects, and offered the said copies in evidence. To the introduction of each of said copies in evidence, the defendant objected. The objections were overruled, and all of said copies read to the jury; and defendant excepted.

The court charged the jury, that if they were satisfied from the proof, that either of the copies of the libel offered in evidence, was substantially a copy of the original libel, and that it was either composed, or published, by defendant, they ought to find for the plaintiffs; to which the defendant excepted.

The assignments of error bring to view the sufficiency of the declaration, and the propriety of the charge of the court, and the sufficiency of the evidence.

RICE, for plaintiff in error. The words charged do not amount to a libel; they may show an intent to calumniate Mrs. Hoss, but are not libellous. No charge is fixed upon Sarah Hoss. "Mrs. Hoss" does not necessarily mean *Sarah Hoss.* [16 Wendell, 16, 19; 6 Am. Com. L. C. 432.]

That which is termed a libel in this case, does not necessarily impute one to the plaintiff, unless connected with other facts by way of inducement, which is not done in this case. [13 Eng. C. L. 128.]

The *innuendo's* in this case, do not merely explain the meaning of the alleged libel: they add to it, and are unaided by the proper averments in the declaration, and are, therefore, bad. [5 Johns. 211, 431, 9; 8 East, 427; 1 Chitty's Pl. 383.]

A cause of action is stated in the declaration, for which the husband alone ought to sue. [2 Com. Dig. 248; 18 Johns. 443; 1 Chitty's Pl. 63, 49, 50, and note; 2 Saunders' P. & Ev. 568.]

The words of the libel should have been stated on the record: it is not sufficient to set out its substance. The term, "matter," employed in the declaration, is not synonymous with words. [1 Raymond, 414; 1 S. & L. 347; 6 Term, 162; 4 Ala. 44.] The whole of the libel should have been set out, and not a part only.

The verdict and judgment being general, if either count is bad, the judgment will be reversed on error, although a general demurrer will not be sustained to both counts. The plaintiff should have taken his judgment on the good count.

WALKER, WM. CHILTON and WHITE, *contra,* cited 5 Modern, 163; 2 Salk. 417; 3 Littell, 389; 1 Binney, 393; 2 Carr. & P. 46.]

ORMOND, J.—Previous to entering upon the decision of the questions presented by the assignment of errors, it is necessary to determine whether the bill of exceptions is to be considered a part of the record. From a statement of the judge who tried the cause, appended to the bill, it appears that it was not sealed at the term of the court at which the cause was tried, and not until more than a year afterwards. He explains why the bill was not sealed

during the term, and the causes which led to further delay, which proceeded principally from the disagreement of counsel as to the points reserved, and the sudden departure of the judge from one of the courts, at which it was expected to be made out.

It is firmly fixed in our practice, that a bill of exceptions may be sealed by the judge before whom it was reserved, after the adjournment of court, if the facts remain in his recollection so that he can, without danger of mistake, certify the point reserved; [Strader, Perine & Co. v. Alexander, 9 Porter, 441;] and that the bill, when so sealed, becomes a part of the record. [Poole v. The Cahawba Railroad Company, 5 Ala. 241.]

A number of affidavits, and a letter from the presiding judge to one of the counsel, have been produced, and a motion made to suppress the deposition. The affidavits certainly tend to establish, that the bill of exceptions does not correctly state the points reserved on the trial, or at least to render it a matter of doubt, which is strengthened by the letter of the judge admitting that he did not recollect the facts very distinctly, and that he relied upon the statements of the defendant's counsel; but we are clear in the opinion, that this is not sufficient to authorize the suppression of the deposition. We cannot try the facts, and determine what was the point reserved at the trial; that can only be ascertained by the court before which the point was reserved. In this case, the judge has certified the bill of exceptions: it is a part of the record, and can no more be impugned by extrinsic proof than any other part of the record.

In The Bank at Decatur v. Kinsey, [5 Ala. 9,] we held, that this court could suppress a bill of exceptions fraudulently or surreptiously obtained; but that is not this case. There is no pretence that the judge did not sign this bill of exceptions, with full knowledge of its contents. If, from the loss of his notes of the trial, or from any other cause, the facts, as they transpired at the trial, had faded from his memory, or had become so indistinct that he could not recollect with certainty what took place, and the counsel on both sides could not agree upon the exception, he should have refused to sign it. Having signed it, no subsequent admission by him can impair its validity.

The practice of signing bills of exceptions after the adjournment of court, ought to be discouraged as much as possible; and when submitted to from the necessity of the case, ought certainly,

if practicable, always be shown previously to the opposing counsel.

Upon the merits, we are very clear in the opinion that the publication complained of, is libellous. The inevitable tendency of such an indecent and shameful publication, was to cover the party libelled with ridicule, contempt, and disgrace; and to cause her to be shunned and avoided by the society in which she lived. This, if published wantonly or maliciously, is a libel, and ought to be punished as such.

It is contended by the counsel for the plaintiff in error, that the charge is so vague and uncertain, that it cannot be intended that it was designed to apply to any person, and, therefore, cannot be made certain by an *innuendo*. The office of the *innuendo* is to explain the allusion to the party intended to be libelled; and if the allusion cannot be rendered certain without reference to the other matter, such extrinsic matter must be placed on the record, by reference to which the words complained of become actionable. The office of the *innuendo* is to explain; it does not introduce new matter. [King v. Horne, 2 Cowp. 684; Holt v. Scholefield, 6 Term, 691.]

Without considering the first count, about which there might possibly be some doubt, the second count charges the libel thus: "To the public, and more especially the ladies—know, as it is well known, that Mrs. Hoss (meaning the plaintiff Sarah) is getting along in the world," &c. &c. It cannot be questioned that the *innuendo* here is appropriate; it does not aver or introduce any new fact, but explains the allusion—that by Mrs. Hoss, the defendant meant Sarah Hoss. In a subsequent part of the same publication, it is stated, that "she, (meaning the plaintiff Sarah,) I am told, visits Mrs. Burnett, alias Haden, decent company for decent folks; if, but as some folks say, they suit very well. I think such ladies ought to establish a whore house: they (meaning said Sarah and Mrs. Burnett) would make good street whores," &c. &c. Here again the averment, that by the terms "*she*" and "*they*" were meant the plaintiff Sarah, and the plaintiff and Mrs. Burnett, the *innuendo* is performing its appropriate function, the explanation of the terms employed, and which require for their explanation the aid of no other fact. The *innuendo* here merely explains the use of the personal pronouns she, and they; and whether the explanation thus given is correct or not,

is to be ascertained by the context. In this case, it is clear that Mrs. Hoss is the person referred to by the personal pronoun "she."

In a succeeding part of the libel, the term, "filly horse," is alleged to mean the plaintiff Sarah, and we do not doubt the *innuendo* is proper. It is a play upon the plaintiff's name, *Hoss*, which any one knowing the plaintiff and reading the libel would at once understand; and is in principle like the case of a libel by signs, or by painting, so significant that though the name of the injured person is not used, every one at once understands who is intended to be caricatured, or ridiculed. Without, therefore, considering the first count, as the second is certainly sufficient, and the demurrer was general to both counts, it was properly overruled.

It was not necessary to set out the entire publication, but it was sufficient to set out such parts as the plaintiff complained of as libellous; if the plaintiff does not, by omitting some portions, produce a new arrangement, and thereby alter the sense. [Tabart v. Tipper, 1 Campbell, 351.] The proper mode is to show that the selected parts are extracts, and if the omitted parts explain, or render innocuous, the parts selected, the defendant may have the advantage of it on the general issue. Such was the mode adopted in this case in strict conformity with the precedents.—[Metcalfe v. Williams, 3 Litt. 389; Buckingham v. Murray, 2 Carr. & Payne, 46; Starkie on Slan. 268.]

We proceed to the consideration of the bill of exceptions.—The original libel having been proved to be lost, the plaintiff produced three copies, each of which was proved to be a substantial copy of the original libel, and all of which differed from each other in some respects. To the introduction of each of the copies, the defendant objected; but the objection was overruled, and all were permitted to be read to the jury. The objection now urged is, that this was proving, not the libel as laid in the declaration, but equivalent slanderous words, which this court held, in Williams and Wife v. Bryant and Wife, [4 Ala. 44,] was not sufficient.

The question before the court was, whether the copies were correct copies of the original. To be so, they must have corresponded with it in all respects. It is a fair presumption, that there was a difference between the copies and the original, but in what

that difference consisted, we have not the means of determining, as the copies are not set out in the record, nor is it stated in what the difference consisted. It may be that words of equivalent import were substituted in the copies for the language of the original; or it may be that the difference consisted in false spelling, or in the collocation of a sentence, which did not alter the meaning. If the former, the copies should have been rejected; if the latter, the variance would have been immaterial. It is the duty of the party complaining of an error to show it on the record affirmatively; and as all reasonable presumptions are to be made in support of the judgment of the court, we must assume that the variance was immaterial. The plaintiff did not undertake to set out the libel in *haec verbà*, or according to its tenor; but that the defendant published a libel of and concerning the plaintiff, "containing, *among other things*, the false, scandalous and libellous matter following, to wit." The rule in such cases is, that the omission or alteration of a letter, which does not render it a word of different signification, will not be a fatal variance. [Calhoun v. McMeens, 1 Nott & McCord, 422; Metcalfe v. Williams, 3 Littell, 387. See the authorities collected by Mr. Starkie, 2 Vol. Ev. 858.]

That the court left it to the jury to say whether the copies were correct transcripts of the original, was an error of which the plaintiff in error cannot complain, as the court had previously decided that they were admissible in evidence, and thereby affirmed their correctness. The permission afterwards given to the jury to pass on that question, was for the benefit of the defendant, and he cannot, therefore, complain of it.

Finally; the court charged, that if the defendant either composed or published the libel, the jury must find for the plaintiff. This is a plain error. To constitute either verbal or written slander, there must be a publication—the contents must be made known to some third person or persons. This is not denied by the counsel for the defendant in error, who insist that the point was not made in the court below, that publication was conceded, as is evident from the fact that there were so many copies of the libel extant. It is, to be sure, very probable that such was the fact; but still it may be that the libel was not intended for publication, and that the copies were taken without the consent of the defendant. There is nothing in the record which conclusively

shows that publication was made; and as the charge was clearly erroneous in point of law, and upon a point necessarily involved in the issue, it is impossible that we should say that the defendant was not prejudiced by it. It may have been the point on which the case turned; and for this error, the judgment must be reversed, and the cause remanded.

FONTAINE & FREEMAN, USE, &c. v. LEE'S ADM'RS.

1. The declaration alleged that the defendant's intestate, as a member of the firm of A L & Co, which was continued for the purposes of liquidation, but in other respects was dissolved, made a promissory note in their name, for the payment of a pre-existing debt of the firm, to the plaintiff: *Held*, that it could not be intended from the declaration, that the firm were liable to the payment of the note; but it imposed an individual responsibility upon the intestate, for which his administrator was suable.
2. Where a declaration contains several counts, to one of which a demurrer is sustained, and on the others issues are tried, and verdict and judgment thereon for the plaintiff; if the demurrer was improperly sustained, the judgment will be reversed *in toto*, and not merely as to the count adjudged to be defective.

WRIT of error to the Circuit Court of Sumter.

This was an action of assumpsit, at the suit of the plaintiffs in error against the defendants.

The declaration contains seven counts, the third of which is in the following words: "Also, for that said William Lee, in his lifetime, at Livingston, in said county, to wit: on the 26th day of June, A. D. 1837, as one of the firm of Abrahams, Lee & Co. which firm had before that time consisted of the said William Lee and others, and was then continued for the purposes of liquidation of the debts and demands of said firm, but had been otherwise and for other purposes dissolved, in and by the promissory note of said firm of Abrahams, Lee & Co. then and there made and given for a debt of said firm of Abrahams, Lee

& Co. then, and before that time due to said plaintiffs, promised said plaintiffs to pay them, or order, at the Planters' and Merchants' Bank of Mobile, where said note was negotiable, on the first day of March then next, the other sum of thirty-six hundred and twenty-three dollars and eighteen cents, for value received. The defendants demurred to this count, pleaded non-assumpsit, and payment to the others; and further, that the supposed promissory notes, in the plaintiffs' declaration mentioned, were never executed or delivered by their intestate, but that James A. Abrahams, of the firm of Abrahams, Lee & Co. executed these notes after the dissolution of the firm, and without the knowledge, consent or authority of the intestate, who has since deceased. This plea was duly verified by oath. The demurrer was sustained, and a verdict returned for the defendant on the pleas; on all which a judgment was rendered against the plaintiffs.

Bliss & Baldwin, for the plaintiffs in error.
Robt. H. Smith, for the defendants.

COLLIER, J. J.—The only question raised by the assignment of errors is, whether the third count discloses a cause of action with which the defendant's intestate was chargeable when living, and which can now be enforced against them as his representatives. This count, it must be admitted, is unusual in point of form. Placing out of view so much as is said in respect to the continuance of the partnership, for the purposes of liquidation, and its dissolution for other purposes, and it charges that the intestate in his lifetime made the note therein described, in the name of Abrahams, Lee & Co. for a debt of that concern before that time due to the plaintiffs, and thereby promised to pay, &c. If the intestate was not authorized to make a note on behalf of the late firm of which he was a member, he could not bind them by such an act, yet he himself would be chargeable on such an engagement. In fact, it would be as much his note as if it was not signed in the firm name.

Without an authority for that purpose from his co-partners, a member of a partnership cannot, after its dissolution, bind them by a note or bill made professedly in their joint names. That is, if due notice has been given that their connection in business has

ceased. The fact that the note or bill has been substituted for a pre-existing debt of the firm, will not impart to it validity in law.

When a partnership is said to be dissolved for all purposes, except that of liquidation, we understand that it has ceased to do the business for which it was originally created; and that the only business in which it is engaged is that of *ascertaining, settling, adjusting and paying the debts of the concern.* Such is but the effect of every dissolution; it does not extinguish the debts, but the legal duty of the individual members of the firm to adjust and pay is still imperative. But in no case, as we have seen, are they severally authorized in virtue of their previous connection to make notes or draw bills that would be binding on all. There must be some new delegation of power, or such an act is invalid, except as to him who is the agent. In New York, it has been held, that if one partner, who is authorized to adjust the concerns of the partnership after its dissolution, settles an account, and acknowledges a balance to be due from the partnership, this acknowledgment will not bind his co-partner. [Hackley v. Patrick, 3 Johns. Rep. 528; Walden v. Shelburne, 15 Johns. Rep. 409; Hopkins v. Banks, 7 Cowen's Rep. 650; Baker v. Stackpole, 9 id. 433.]

In Sandford v. Mickels & Forman, [4 Johns. Rep. 224,] upon the dissolution of the partnership it was agreed that one of the partners should take the stock in trade, and collect and receive the outstanding debts and pay the debts of the partnership; yet it was held that this did not confer the authority to indorse notes, and that he could not use the name of his late firm in order to transfer the title of a note of which it was the legal proprietor. And in The Bank of South Carolina v. Humphreys, [1 McC. Rep. 389,] it was decided, that after a dissolution of a partnership, one partner cannot bind the other, by drawing a note in the partnership name, unless he has special power vested in him for that purpose: it is not enough that he be authorized to settle the partnership accounts. [See, also, Whitman v. Leonard, 3 Pick. Rep. 177; Whitaker v. Brown, 10 Wend. Rep. 75; 2 Phil. Ev. C. & H.'s notes, 173–4.]

From the view taken, it results that what is said in the count we are considering, of the continuation of the partnership for the purpose of liquidation, can have no influence in determining that the cause of action disclosed in it, is not enforceable against the

representatives of the intestate. If the partnership were liable upon the note, then the count might be bad, because it does not show that the intestate survived his co-partners, or that they, if living, are insolvent, &c. as the statute provides. But we can discover no substantial defect for which the demurrer should have been sustained.

It is insisted for the defendant in error, that even if the circuit court erred, yet the judgment should only be reversed in respect to the third count. Our practice has been in civil cases, where a judgment is erroneous, and cannot be here amended or rendered, to reverse it *in toto*, so as to place the parties in the precise condition in which they stood at the time the first error was committed. If the primary court overrules a demurrer to an entire declaration, or one or more of several counts, and an issue is tried and found for the plaintiff, the revising tribunal not only reverses the judgment on demurrer, but also that rendered upon the verdict: and this, although the several counts are, in point of fact, obviously founded upon distinct causes of action. The party who has been prejudiced by a decision against him, can only have the error repaired by such a practice. If he voluntarily proceeded to try the issue of fact, instead of seeking to correct the action of the court upon demurrer, then, perhaps, the plaintiff should not be allowed to insist upon a re-trial of the same issue; but he is not permitted to appeal or sue a writ of error until the entire cause is disposed of. In this view, it would seem but sheer justice that a plaintiff, at whose instance a judgment at law has been reversed, should be entitled to a trial *de novo*.

The analogy, which the counsel for the defendant in error has sought to establish between civil and criminal proceedings, cannot be maintained. The nature of prosecutions at the instance of the State; the rights secured to the accused by the humane provisions of the common law, and the guaranties of the constitution, all concur to show the striking impropriety of trying the second time for the same offence, one who has been already acquitted. To this it may be added, that there is not the same connection between public offences, as there is between private demands, which, for anything appearing to the contrary, may grow out of the same transaction.

A judgment at law in a civil cause, is an entire thing, and it is only that which is the final action of the court upon all the points

arising in the cause, that authorizes a writ of error. And whenever there is error in the proceedings which entered into and affected the disposition of the cause, the judgment is annulled, and if remanded, the case must be proceeded in, as if it had never been tried.

This brings us to the conclusion that the judgment of the circuit court must be reversed, and the cause remanded.

TAYLOR v. MORGAN.

1. When a plaintiff's note is offered under a general plea of payment or set-off, it is necessary to prove its execution, otherwise it may properly be rejected.

WRIT of error to the Circuit Court of Dallas.

Assumpsit by Morgan against Taylor, as the maker of a promissory note. The defendant pleaded non-assumpsit, payment and set-off; and at the trial under the latter issue, offered in evidence a note, purporting to be made by the plaintiff, and witnessed by one Taylor. The plaintiff objected to the note, that its execution should be proved by the subscribing witness, and the court having sustained the objection and rejected the note, the defendant excepted. This is now assigned as error.

G. W. GAYLE, for the plaintiff in error.

EVANS, *contra*—cited Cass v. Northrop, [1 S. & P. 89,] and Carew v. Northrop, [5 Ala. Rep. 267.]

GOLDTHWAITE, J.—The case of Cass v. Northrop, [1 S. & P. 89,] seems to be decisive of this; indeed, the only difference between them is, that there, the making of the note offered as a set-off, was proved, but not its indorsement. Both, however, depend on the same principle, which is, that the several statutes making writings evidence of the debt or duty promised by them,

unless denied on oath, do not apply except in cases where the writing is the foundation of the action. The necessity for this distinction will be apparent when it is considered that a different rule would expose the plaintiff to the plea of a lost release or other instrument in writing, by reason of which he would fail in his action, not being present to interpose the necessary replication of *non est factum*, on oath. [See Parks v. Greening, Minor 178.]

Judgment affirmed.

McLANE v. SPENCE, Adm'r.

1. An executor or administrator having an interest in the estate may purchase at his own sale, provided it is fairly conducted; if not, it may be set aside by creditors or legatees, but is not a nullity.
2. Where one as the executor or administrator of two estates, becomes possessed of the property of both, as he cannot sue himself, he will be presumed to retain what is due from one, to the other, whether it be a debt or unliquidated damages.
3. S being administrator of the estates of K and C, elected to consider certain slaves, which C, being the former representative of the estate of K, had purchased at his own sale, as the property of the estate of K, by hiring them out, as such, and in various other modes. The slaves having been sold under execution against the estate of K, S brought an action against the officers for a trespass upon the estate of C: *Held*, that as he had elected to consider the slaves as the property of the estate of K, he could not afterwards insist they were the property of C, as he had merely done what a court of chancery would have directed, if application had been made to it to set aside the purchase made by C.

Error to the Circuit Court of Talladega.

Trespass *vi et armis*, for taking and carrying away two slaves.

From a bill of exceptions taken in the cause on the trial, it appears—That one William King died and left a will, by which he appointed his wife and one John C. Calhoun, as his executors, who qualified as such, and took upon themselves the burden of the administration of the estate; the latter being a minor—That

the estate of King was largely indebted, and that J. C. Calhoun caused a sale to be made of the personal estate of his testator, at which he put up and sold in one lot, and purchased himself, twelve slaves, consisting of a man and his wife and ten children; That he never executed any bond or note for the slaves so purchased, nor made any return thereof to the county court, but carried them home, he living with his mother, Mrs. King, and worked them as his own—that the slaves were sold at a lower rate than they would have brought if sold in separate lots, or singly.

That J. C. Calhoun afterwards died, and Mrs King being removed from her office of executor, D. A. Griffin, sheriff of Talladega county, became *ex officio* administrator, *cum testamento annexo* of King, and also administrator of Calhoun's estate, and received from Mrs King the negroes purchased by Calhoun, and hired them out; and shortly after going out of office, both estates devolved on the defendant in error, as the successor of Griffin in the sheriffalty, who received the negroes in controversy, and hired them out—That one McCartney, who had obtained a judgment against the administrator of King, caused it to be levied on the slaves in controversy, by the plaintiff in error, as coroner, and sold them for its satisfaction.

That the defendant in error, after this sale, reported both the estate of King, and that of Calhoun, insolvent—that in his report he credited the estate of King with the hire of the negroes, and returned as one of the debts due by King's estate, the balance due on two judgments of McCartney, under which the slaves in controversy had been sold, after deducting the amount of the sale.—The defendant justified under this sale.

In the progress of the trial, the plaintiff was permitted to prove by a witness, that he had advised J. C. Calhoun, that he might pay the debts due by his testator, and save the family of negroes he had bought, to which the defendant objected; but the court permitted the testimony to go to the jury to repel the presumption of fraud in the purchase of the slaves; to which the plaintiff excepted.

The defendant's counsel moved the court to charge, that if said Calhoun put up the twelve slaves in one lot, with the intention of buying them in himself at an under value, and did so purchase them, it would vitiate the sale. This charge the court refused, and instructed the jury, that the purchase under such cir-

cumstances would be good unless made with the intent to delay, hinder and defraud creditors.

The defendant also moved the court to charge, that if Calhoun knew of the indebtedness of his testator, and was at the time he gave his official bond, and made the sale, an infant, that if he gave no note or security for the property purchased by him, and had no visible means to enable him to pay for it, that such sale did not change the title of the property, and exempt it from sale for the debts of King. This the court refused, and charged, that if the sale was fair—if Calhoun took possession of the property as his own, and continued to act as executor after he became of age, and ratified his former acts, it was not necessary for him to give any other security for his purchase than was afforded by his official bond.

The defendant further moved the court to charge, that if the jury believed that Spence had returned in his inventory the amount for which the negroes were hired out, as part of King's estate, and in his report of the insolvency of King's estate, had credited the demand of McCartney with the amount for which the slaves had sold, the jury might consider it a recognition or affirmance of the sale, and in that event he could not recover; which the court refused. To all which the defendant excepted.

Judgment being rendered for the plaintiff, the defendant prosecutes this writ, and assigns for error the charges of the court, and the refusals to charge as set out in the bill of exceptions.

W. P. Chilton, for plaintiff in error—contended, that the purchase by the executor at his own sale, was void. [4 Dess. 504; 1 Hawk. 497; 24 Law. Lib. 190; 11 Vesey, 226; 10 id. 426; 6 id. 627; 8 id. 398.]

The executor can acquire no title by a breach of the trust.

White, *contra.*

ORMOND, J.—In Brannan v. Oliver, [2 Stewart, 47.] it was held by this court, that a purchase by an administrator at his own sale, was not void, but was *prima facie* valid, and would be supported if no unfairness appeared. This decision is explained in Saltmarsh v. Beene, [4 Porter, 283.] to be confined to that class of trustees, having an interest in the property so purchased.

In this case it appears, that the executor purchased a lot of slaves, twelve in number, at his own sale—that they were put up in one lot, and purchased by him for less than they would have sold, if sold separately—that he made no return to the orphans' court, of sale, nor executed any note for the purchase money with surety, but converted the slaves to his own use.

We think it clear, that this sale could not be supported if contested by legatees or creditors, but upon a proper proceeding, would have been set aside, and a re-sale ordered. Nor would it avail to validate the sale, for the executor to show, if in his power, that he did not intend by his purchase to defraud the creditors of the estate. To support a purchase by an executor or administrator at his own sale, there must be no unfairness; the property must be exposed to sale in the usual and ordinary mode, and under such circumstances as to command the best price. In this case, the sale of twelve slaves in one lot, many of whom were grown, was directly calculated, if it was not intended to enable the executor to buy them in at an under value; and although it would doubtless be proper to sell husband and wife, or parent and small-children together, it could not be tolerated that twelve slaves, most of whom were grown, should be sold in one lot, thereby diminishing the range of purchasers, and the prospect of obtaining a fair price; the result of which was in this case, that the slaves were bought in below their value. The creditors and legatees have also a right to the security afforded by such sales to strangers, and if this is omitted to be afforded, they are prejudiced by the purchase by a representative of the estate.

But, however irregular and voidable such a sale may be, it is not a nullity. The title would pass to the purchaser until divested by a proceeding against the executor, having that for its object. Although the sale may be irregular, until it is set aside, the purchase money is assets of the estate in the hands of the executor, and it results necessarily, that the slaves could not be also, assets of the estate—such being the fact, if there was nothing else in the case, as the estate of King had no property in the slaves at the time of the levy by the coroner, the levy was illegal, and he would be answerable to the representative of Calhoun's estate. There is, however, another important fact disclosed in the case, which changes its aspect entirely.

Upon the death of Calhoun, Spence, as sheriff of the county,

became *ex officio*, the legal representative, both of his estate and that of King, and as such, received the assets of both. It became necessary for him to determine whether the slaves purchased by Calhoun at his own sale, were his property or the property of King's estate, and it appears that he elected to consider them as the property of the latter. This is demonstrated by his acts, showing most unequivocally, that he did not consider the estate of Calhoun entitled to the property. He hired out the slaves as the property of King's estate, and after the sale made by the coroner, of the same slaves, to satisfy a judgment obtained against him as the representation of King's estate, he reported to the orphans' court, the balance of the judgment not satisfied by the sale, as the debt due the judgment creditor, on reporting King's estate insolvent.

He had the undoubted right to consider the property as belonging to the estate of King, and to treat it as such, if justified by the facts of the case, and if the same result would have been produced by a proceeding in equity, to set aside the sale; as it cannot be doubted that a party may do that voluntarily, which a court of equity will compel him to do, and from the previous examination, it appears that he did precisely what a court of equity would have directed, upon a proceeding to set aside the sale and purchase made by Calhoun. He is, therefore, estopped by his own act, from saying, that the slaves sold by the coroner, were not assets of King's estate. It would be the grossest injustice, to permit him to treat the slaves as the property of the estate of King, until they are seized and sold for the payment of its debts, and then claim them as belonging to the estate of Calhoun.

The principle upon which this portion of the case rests, was the ground of the decision in Draughon v. French's adm'r, [4 Porter, 352]—that where one becomes possessed of two estates, as the legal representative of both, as he cannot sue himself, he will be presumed to retain what is due from one to the other, whether it be a debt, or unliquidated damages.

Without, therefore, examining the other questions raised upon the record, it follows from the view here taken, that the court erred in the refusal to give the third charge moved for by the defendant.

The other charges of the court affirming the validity of the purchase by Calhoun, unless there was an express intention

found by the jury to defraud creditors, were wrong in point of law, and although to a certain extent abstract, yet its direct tendency was to mislead the jury, by placing the decision upon a question not material to the inquiry before them. Let the judgment be reversed, and the cause remanded.

THE INTENDANT AND COUNCIL OF THE TOWN OF MARION v. CHANDLER.

1. The Circuit Court may take jurisdiction by *certiorari*, of a case in which the intendant of a corporate town has rendered a judgment against a person resident within the same, for the violation of one of its by-laws.
2. An act incorporating a town, authorised the enactment of by-laws "to restrain and prohibit every species of gambling, drunkenness, &c.; to grant licences to the retailers of spirits and liquors; to regulate and restrain them when deemed a nuisance;" and to pass all such by-laws consistent with the constitution and laws of this State, as may be necessary, &c. Under this grant of power, the corporation passed an ordinance prohibiting the retailing of spirituous or fermented liquors within the corporate limits, without first paying to its treasurer the sum of one thousand dollars for a license for one year; and for retailing without such licence, a penalty of ten dollars a day was imposed, and made recoverable by warrant before the intendant, &c.: *Held*, that this by-law was authorized by the act of incorporation.

WRIT of error to the Circuit Court of Perry.

This was a proceeding commenced by a warrant issued by the Intendant at the suit of the plaintiff, for the breach of one of its by-laws, which imposed a penalty for the retailing of "spirituous or fermented liquors, within the corporate limits of the town of Marion, without first obtaining a licence for one year from the clerk of the said corporation." Upon the return of the warrant, a judgment was rendered against the defendant for the sum of ten dollars and costs. Afterwards the proceedings were removed by *certiorari* to the circuit court, at the defendant's instance, where the plaintiff moved that the same might be dis-

missed. But this motion was overruled, the judgment of the Intendant reversed, and the plaintiff taxed with the costs.

T. Chilton and H. Davis, for the plaintiff—made the following points: 1. The circuit court had no jurisdiction of the case as it arose under the by-law of a corporation. 2. The plaintiff in virtue of its corporate authority might prohibit the retailing of spirituous liquors within the town, unless a licence was first obtained; and it was competent for the corporate authorities to prescribe the price. [Acts of Leg. 1834–5, p. 58–9; Acts of 1843–4, p. 57; 7 Cow. Rep. 585, 606; Ang. & Ames on Corp. 64; 3 Ala. Rep. 137–9, 141–3; State v. Estabrook, at this term.]

No counsel for the defendant.

COLLIER, C. J.—There can be no question, but it was competent for the circuit court in virtue of its general jurisdiction to award a *certiorari* in the present case. *Ex parte* Tarlton, [2 Ala. Rep. 35,] determines such to be the appropriate remedy where a new jurisdiction is created by statute, and the court exercising it, proceeds in a summary method, or in a course different from the common law. If the circuit court could not correct or annul an improper judgment rendered by an officer of the corporation under one of its by-laws, the party aggrieved would be remediless; for this court, under its general superintendence and control of inferior jurisdictions, could not interfere, until the cause had been acted on, either by the circuit or county court, or court of chancery. [John, a slave, v. The State, 1 Ala. Rep. 95; The State *ex rel.* Williams, id. 342.]

The second section of the act of 1835, "to incorporate the town of Marion," enacts, "that the said corporation shall have power to ordain all such ordinances and resolutions, and make all such regulations, as may by them be deemed necessary for the good order and government of said corporation, which may extend to the preservation of health, to prevent and remove nuisances, &c.; to restrain and prohibit every species of gambling, drunkenness, &c.; to grant licences to the retailers of spirits and liquors; to regulate and restrain them when deemed a nuisance, &c., and in general to pass such by-laws not contrary to the constitution of this State, and the laws thereof, as the corporation shall from time to time deem expedient and necessary to carry into effect, the meaning and intention of this act, &c."

Under the authority of this section, the corporation, at the request of a large majority of the adult males, resident within the town, passed an ordinance inhibiting the retailing of spirituous or fermented liquors within the corporate limits, without first paying to the treasurer of the corporation, the sum of one thousand dollars, for a licence to be issued by the clerk, which shall be operative for one year. For each days infraction of this ordinance, a penalty of ten dollars is recoverable by warrant, before the Intendant, &c.

The object of the corporation in requiring retailers to pay for a licence, a sum so much beyond what the legislature have required by the general law upon the subject, was doubtless, to prohibit the business of retailing within the limits in which its legislation operates; and we will therefore consider the ordinance as prohibitory. The question then is, was the enactment of the ordinance within the scope of the powers conferred by the charter.

It is said that the by-laws of a corporation must not be inconsistent with its charter; for this instrument creates it an artificial being, imparts to it, its power, designates its object, and usually prescribes its mode of operation. It is the fundamental law of the corporation; and in its terms and spirit, is a constitution to the petty legislature of the body, acting by and under it. [Ang. & A. on Corp. 281–2.] The *incidental* power of a corporation to make by-laws results from the necessity of such a power, to enable the body politic to answer the purposes for which it was created, and can be applied to nothing else; and though the power is conferred by the express terms of the charter, yet the reasonable construction of this particular grant is, to consider it as a mean to the company for the accomplishment of the purposes of the principal grant of incorporation, and of course to be limited in its exercise to those purposes. [Id. 268.] The legislative power of a corporation is restricted by the constitutional and statute law of the State in which it is established. Indeed, whenever a by-law seeks to alter a well settled and fundamental principle of the common law, or to establish a rule interfering with the rights, or endangering the security of individuals or the public, a statute or other special authority, emanating from the creating power, must beshown to legalize it, either expressly or by implication. [Id. 275.]

Again: The power to make by-laws, supposes the power to enforce them by pecuniary penalties, proportionable to the of-

fence. The reasonableness of the penalty must be determined by the nature of the offence, but it must be for a sum certain.—[Ang. & A. on Corp. 302; The Mayor, &c. of Mobile v. Yuille, 3 Ala. Rep. 137.] Whether a by-law is reasonable or not, is a question for the court solely; but to set it aside, for unreasonableness, there should be no equipoise of opinion upon the matter, but it should be demonstrably shown. [Ang. & A. on Corp. 298–9.]

It has been held that a by-law of a municipal corporation imposing a penalty for an offence, is not void, merely because a general law of the State prescribes a punishment for the same offence. [Rogers v. Jones, 1 Wend. Rep. 237. See also, 1 Bay's Rep. 382.]

We will not inquire whether, under the first part of the section which authorises the adoption of general police regulations, it was competent for the corporation to have enacted the ordinance in question, but we will inquire whether the authority "to grant licences to the retailers of spirits and liquors; to regulate and restrain them when deemed a nuisance," does not confer upon the corporation the power to prohibit retailing within its limits. "Regulate" may be thus defined, viz: To adjust by rule, or established mode—To put it good order—To subject to rules or restrictions: "Restrain," means to check; to hold from action, &c. to repress; to suppress; to abridge; to limit; to confine; to withhold; to forbear.

It will be admitted, that the term "grant," by implication, necessarily conferred the authority to prescribe the manner in which licences to retail should be obtained. We do not mean by this, that it invested the corporation with unlimited power over the subject, and that it was competent for it to fix the price of a licence at any sum, no matter how large, or that it could impose unreasonable restrictions upon the mode of obtaining it.—But the charter does not merely authorise the corporation to *grant* licences; it goes further and gives the power to *regulate* retailers, and when deemed a nuisance, to *restrain* them. That is, to declare the mode in which the business shall be carried on, to subject it to rules and restrictions, that good morals may be preserved; and if this shall become impracticable, and it is supposed that retailers incommode or annoy, or are offensive or noxious to the people of the town, then to withhold licences, and thus suppress the business. This is but a mere para-

phrase of the grant of power we are considering, and we think, is so palpably just, as scarcely to require further amplification.

It occurred to us upon the first presentation of the question, that it was well worthy of inquiry, whether it was competent for the corporation to do more than restrain retailers whom it had previously licensed, or whether its laws must not be directed against individuals who were guilty of a nuisance. But more reflection has satisfied us, that it was within the sphere of its competency to repress the business of retailing, if deemed a nuisance. Upon any other hypothesis, the term "restrain," would be entirely inoperative; for the terms "grant" and "regulate," would confer ample power, so far as retailers are individually concerned, to adjust their mode of carrying on the trade, and by appropriate rules to keep them in order; and if not, to withdraw a licence, at least to refuse its renewal for a breach of any of the regulations of the corporation.

We are not to understand that "nuisance" was used in the charter in a sense strictly technical, but in its usual and popular acceptation; this is indicated by the connection in which it is found. If it was intended thereby to designate an offence known to the law, then it would be necessary that there should be a trial and conviction in order to establish its commission. No trial is contemplated, but it is enough if retailing is "*deemed* a nuisance."—Here, the corporate power to whom pertains the functions of local legislation, are to determine, whether *retailing is a nuisance*, so as to warrant the exercise of the extraordinary and high power of restraining it.

It follows from what we have said, that the by-law under which the proceeding in the present case was instituted, was authorised by the power conferred by the act of incorporation.—The penalty prescribed as a consequence of its violation seems to be reasonable, and is not objectionable for uncertainty. No question has been made as to the power of the legislature to confer upon a corporation of its creation, the right to prohibit the retailing of liquors within its limits; and as we are inclined to think that such an act is within the competency of legislation, we will not now attempt to consider the point.

Without adding any thing as to the expediency of the restraining by-law, in a town which its inhabitants are seeking to make distinguished for its institutions of learning, it may be remarked that it was demanded by the almost unanimous voice of the peo-

ple who were authorised to decide; and is not consequently the ill judged or inconsiderate act of the few who enacted it.

Our conclusion is, that the judgment of the circuit court is reversed, and the cause remanded.

LACY v. LE BRUCE AND PRINCE.

1. Where the same person was a partner in two partnerships, and one of the partnerships executes its note to the other, or becomes otherwise indebted, the death of the common partner removes the impediment to a suit at law to recover the demand, and the survivor of the one concern may sue the survivors of the other, at law.

WRIT of error to the Circuit Court of Sumter.

Assumpsit by Lacy as the surviving partner of one Bates, against Le Bruce and Prince, also the surviving partners of the same Bates, but in a different firm. The note declared on, is made by the firm of S. Bates & Co. and is payable to the steamer Favorite.

At the trial, it was in evidence that Lacy and Bates were the owners of the steamer Favorite, and were intended by that designation in the note; also, that Bates was dead. The defendants proved that Bates was a member of the firm by which the note was made.

On this state of proof, the court instructed the jury, that if Bates was a member of the firm designated by the steamer Favorite, the payees of the note, and was also a member of the firm making the note, then the plaintiff could not sustain this action. The plaintiff excepted to this charge, and it is now assigned as error.

BLISS, for the plaintiff in error, insisted that the rule, which would have prevented a suit on this note, in the lifetime of Bates, is technical, and applicable solely to the remedy; and whenever

the legal obstacle is removed by his death, his survivor in the one firm could properly maintain the action against the survivors of the other firm. There is no such relation between the survivors as requires them to go into equity; nor could they do so. As illustrative of the rule, he cited Clay's Digest, 323, § 63; 1 Chitty's Plead. 12; 3 Term, 433; 5 ib. 493; 6 ib. 582; Smith v. Strader, 9 Porter, 446; Hazelhurst v. Pope, 2 S. & P. 259; Smith v. Lasher, 5 Cowen, 688; Pitcher v. Burrows, 17 Pick. 361.

LYON, *contra*, cited and relied on Tindal v. Bright, Minor, 103; Mainwaring v. Newman, 2 B. & P. 120; Moffat v. Milligan, 2 ib. 124.

GOLDTHWAITE, J.—The question in this case is, whether the surviving partner of one partnership can sue the surviving partners of another, for a debt, when the deceased partner in each of the partnerships is one and the same person. In this statement of the question, it will be perceived that the evidence of the debt, in the form of a written admission, or as a promissory note, is laid out of view; and we present it thus, because, in our opinion, the nature of the evidence by which the debt is made manifest, does not affect the principle which must govern it. It will become obvious to one who will consider such a case, that if the common partner was alive, and the unsettled demand between the two partnerships could not be amicably adjusted, there would be great difficulty in ascertaining how soon a suit in equity could be brought. A suit at law would be out of the question, inasmuch as the common partner could not sue himself; nor could an action be maintained by his partner because of his not having the entire legal interest in the debt. But although it is difficult to conceive how redress would be come at, as between the two concerns, it is not so to determine that a duty is owed by the debtor partnership. If, then, this duty continues to be due from the survivor of the one partnership to the survivor of the other, after the death of the common partner, what reasons are there that it should not be enforced at law? or that the parties should be forced into equity? Perhaps these questions will be best answered by a consideration of the interests which survive to the other partners where one of a partnership dies. All the debts of the partnership at once become the debt of the survivors,

and the personal representative of the deceased partner is not bound; though, in equity, he is yet liable. On the other hand, all the choses in action of the partnership pass at once to the survivor, and the personal representative has no legal interest in them. It has been held in many cases, that where a partnership has made a note or bill to one of the partnership, it may be assigned so as to give the holder a right of action against the partnership. [Smith v. Lasher, 5 Cowen, 688; Pitcher v. Burrows, 17 Pick. 361; Hazelhurst v. Pope, 2 S. & P. 259; Smith v. Strader, 9 Porter, 446.] All these cases recognize the same general principle, which is, that a debt or obligation may be *created* to one partner by the firm; and that this may be assigned by him whenever that intention is declared by a note or bill. A promise by a partnership to pay a sum of money to one of the partners, when there is no agreement that he may assign it, may always be considered as clogged with the equity of being chargeable with any balance he may owe the firm upon a settlement of all its business; but we think there is no such equity existing when there is a common partner in two partnerships, and the one promises to pay or is indebted to the other in a sum of money. In such a case, there is a moral obligation that the debt shall be paid, and nothing stands in the way of a legal suit but the circumstance that the common partner would be both plaintiff and defendant. Whenever this impediment is removed by his death, the demand is assigned by operation of law, and a legal right of action is invested in his survivor. The personal representative of the deceased partner has no interest whatever in the suit between the two partnerships, or rather between the survivors of them. Indeed, it is difficult to imagine why a suit in equity should be necessary to enforce such a right; for it is certain that the interest of the personal representative is perfectly equipoised between the two concerns. To him, it is a matter of entire indifference which succeeds, as the diminution of the assets of the one will increase those of the other to precisely the same extent. The case is doubtless one of first impression; but that is no reason by itself for forcing a suitor into a court of equity to obtain a remedy for a clear legal right. We have, on one occasion, endeavored to show that courts of law will mould their proceedings to afford a remedy at law, although at first view the remedy may seem inconsistent with principles generally recognized. [Elliot

v. Montgomery, 4 Ala. Rep. 600.] In the present case, it seems to us that if the parties were sent to a court of equity it would be to litigate a right which all the elementary writers admit to be entirely of a legal nature. Neither party there would have any rights different in any manner from what they now are; nor have these rights any connexion with those of third persons, which prevent a full adjudication in a court of law.

For these reasons, we are of opinion that the suit is properly brought; and, therefore, the judgment of the circuit court is reversed, and remanded.

ASKEW v. WEISSINGER, Ex'r.

1. An account filed against an insolvent estate, is not, under the statute, previous to the passage of the act of 1843, sufficiently proved, by an affidavit of its correctness, made at the time it is filed, but if objected to, it must be proved according to the course of the common law.

Error to the County Court of Perry.

Davis, for plaintiff in error.
T. Chilton, *contra.*

ORMOND, J.—This case, as it regards the jurisdiction of this court, is in the same condition as the case of Cawthorne v. Weissinger; but as the case has been argued upon its merits, it is proper we should express our opinion upon it. The 10th and 11th sections of the act of 1843, [Clay's Dig. 194,] provide that an affidavit should be filed with the account in the clerk's office against an insolvent estate, which if not contested within nine months after the estate is declared insolvent by the administrator, or the creditors in his name, should be sufficient proof of the account. That statute, however, does not apply to this case.

By the old law, creditors were allowed "to file the evidences

of their claims" in the clerk's office, [Aik. Dig. 154, § 7,] which by a fair construction, would probably apply to a sworn account, as it could in no other way be evidence. This, however, was merely *prima facie* evidence of the claim, and if other proof was required, it was necessary that it should be made, or the claim would be rejected.

The claim, therefore, against an insolvent estate, must, like any other, if contested, be proved according to the course of the common law, and the court was correct in rejecting the affidavit of James Abbot, establishing the correctness of the account, because it was taken *ex parte*. The deposition of Toller, taken with notice, merely proves that the charges were reasonable, but he knows nothing of the account. The court, therefore, did not err in excluding it, and in refusing to allow the account, it being contested by the executor.

Let the writ of error be dismissed.

GRIFFIN v. THE BANK OF THE STATE OF ALABAMA.

1. The notice issued at the suit of a Bank requiring its debtor to answer to an allegation of indebtedness, is process to bring the latter into court; but after the motion for judgment has been submitted, it may be regarded as a motion in writing, identifying the debt, to which the defendant may either demur or plead to issue.
2. Where a notice of a motion for judgment in favor of a Bank states the time when the note was discounted, so as to show that it was before it bears date, this statement, as it is unnecessary, may be treated as surplusage.
3. A notice at the suit of a Bank need not be dated, unless the date is made material by a reference to it, as indicating the time when the motion will be made, &c.; and although the indorsement of its receipt by the sheriff shows that the notice was placed in his hands before the maturity of the debt, yet if it is not served until after the debt is due, no objection can be made to this defect in the notice.
4. A defendant cannot object on demurrer that he is not regularly before the court; if such an objection be available, he must plead in abatement.
5. The plea of *non assumpsit* to a notice of a motion for judgment at the suit of

the Bank, throws upon the plaintiff the *onus* of proving the material facts stated in the notice; and if the note sought to be recovered is misdescribed as to the time of its maturity, the variance will be fatal to the motion.

WRIT of error to the County Court of Tuskaloosa.

This was a proceeding by notice and motion, at the suit of the defendant in error against the plaintiff. The notice set out, that the defendant below, as principal, and Thomas L. Holly and George W. Butts, as his sureties, were indebted to the president and directors of the Bank of the State of Alabama, by a note discounted by the Bank on the 2d February, 1840, made for the sum of five hundred and twenty-six dollars, bearing interest at the rate of eight per cent. per annum from its date, and dated the 1st February, 1843, payable to the president and directors of the bank of the State of Alabama, and payable and negotiable at the bank, for value received, twelve months after date, &c. The notice then informed the parties that the president of the bank would move the county court of Tuskaloosa county, at the next term thereof, to be holden on the 2d Monday in May, 1843, for judgment against each of them, for the amount due on the note, with interest, &c. The notice is tested of the 21st of December, 1843, and was regularly served on Griffin, but returned "not found" as to Holly and Butts.

The defendant demurred to the notice, and the demurrer being overruled, he pleaded *non-assumpsit;* issue being thereupon joined, the cause was submitted to a jury for trial. From a bill of exceptions sealed at the instance of the defendant, it appears that the notice, together with the certificate of the president of the bank, that the debt sought to be recovered was really and *bona fide* the property of the bank, were read in evidence without objection. The plaintiff then offered a note in the following words, to sustain the issue on his part:

"Talladega county, 1 February, 1843.—On the first of June next after date, we, David A. Griffin, as principal, and Thos. L. Holly and George W. Butts, as securities, jointly and severally promise to pay the president and directors of the bank of the State of Alabama, five hundred and twenty-six dollars, negotiable and payable at said bank, for value received, with interest from date, at eight per cent. per annum."

"Taken, 2d February, 1843."

This note was subscribed by the defendant and his sureties, as alleged in the notice, but it varied from the description therein made, and the defendant objected to its admission. His objection was overruled, and he thereupon excepted. A verdict was returned for the plaintiff, and a judgment was rendered accordingly.

T. D. Clark, for the plaintiff in error, insisted, that the notice was inconsistent in itself, and was demurrable; but even if unobjectionable upon its face, it did not correctly describe the note which was sought to be recovered; and it should have been excluded from the jury. [2 Ala. Rep. 346, 505; 5 id. 27.]

B. F. Porter, for the defendant, contended that the notice was only process in the cause intended to bring the defendant into court, and that a demurrer to it could not be entertained. That it had served its purpose when it had been executed on those to whom it was addressed; it was not permissible for a defendant to plead to it, in order to make up an issue, and then object that the evidence of the debt adduced, was inaccurately described.

COLLIER, C. J.—The notice issued at the suit of a bank against its debtor, is certainly process by which the latter is to be brought into court to answer to an allegation of indebtedness. But after the motion is made, which it informs the party will be submitted, it is something more than process; it is then to be regarded as the motion in writing identifying the debt sought to be recovered, and against which the defendant may urge any ground of defence recognized as available, according to legal forms. The notice, then, may be assimilated to a declaration: it subserves the purpose both of a writ and declaration, though it need not be so formal or techical in its allegations as the latter. Yet it should set out the evidence of indebtedness with such precision that the defendant may know, from an inspection of the notice itself, against what he is called on to make defence. From this view, it will follow, that it is allowable for the defendant either to demur to the notice, or plead to issue.

It is insisted that the demurrer interposed in the county court should have been sustained, because the notice states that the

bank purchased the note about three years before it was made, and because the notice issued previous to its maturity.

In respect to the recital in the notice of the time when the note was discounted, this is certainly irreconcileable with the description, and allegation as to its date that follows. But as it is not essential to a notice in such case, that it should state at what time the bank became the proprietor of the paper, we think the recital in this respect might be treated as surplusage, and where it disagrees with the description, be stricken out, without prejudicing in any manner so much as is material.

Where a suit is brought in the ordinary form, by a *capias ad respondendum*, it would be competent for a defendant to object that the action was instituted before the maturity of the debt; and in such case, the teste of the writ would be looked to, for the purpose of ascertaining when the action was commenced. [Randolph v. Cook & Ellis, 2 Porter's Rep. 286.] But in a case like the present, no suit is pending until the motion is in fact submitted. The notice need not be dated, unless the date is made material by a reference to it as indicating the time when the motion will be made, &c. Hence the date, or the want of it, where it is not necessary to support some essential part of the notice, cannot prejudice the plaintiff.

The time when the county court was to be holden, is to be ascertained by the date of the notice, and thus far the date would be essential to its regularity, if the time did not otherwise appear. But the sheriff's return shows, when the notice was received by him and served on the defendant; and when this is referred to, it is sufficiently apparent at what term it was proposed to move for judgment. It cannot be objected to this view, that taking the description of the note contained in the notice to be correct, the notice was placed in the sheriff's hands previous to the maturity of the note. Be this as it may, the indorsement of the receipt may be considered as wholly unimportant, and as the notice was not executed until after the debt became due, it may be regarded as a good notice in the sheriff's hands for the time intervening between its service and the maturity of the note. But were the law otherwise, the defendant could not object on demurrer that he was not regularly before the court; his appearance generally would preclude such an objection, and if it could

be made available in any form, it would be available by plea in abatement.

The plea on which issue was taken, was a denial of the cause of action disclosed in the notice, and threw upon the plaintiff the *onus* of proving that the defendant, with the sureties designated, had made a note substantially conforming to that described.—The note produced at the trial is dated the 1st of February, 1843, and due on the first of June thereafter, while that described bears the same date, but is alleged to be due twelve months thereafter. This variance cannot be regarded as immateral. If the description is correct in the notice, (and if otherwise we cannot know it,) the note adduced as evidence was due eight months before that described in the notice, matured. For this discrepancy, it should have been rejected; and for not so adjudging the law, the county court erred. Its judgment is consequently reversed, and if desired, the cause will be remanded.

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2. If a party to whom an account is rendered, admits its correctness, it becomes a *stated account;* or if he retains it and makes no objection within a reasonable time, his silence will be construed into an acquiescence in its justness, and he will be bound by it, as if it was a *stated account.—Ibid*.....518

ACTION.

1. An instrument, purporting to be a bill of exchange, which does not direct to whom the money is payable, may be the foundation of a suit, in the name of the person from whom the consideration moved, and to whom it was delivered by

ACTION—*continued.*

the drawer; but an action cannot be maintained thereon, by a third person, as bearer.—*Prewitt* v. *Chapman*.....86

2. An action against a sheriff for failing to levy process, cannot be supported by proof that the money had been collected by him.—*Griffin* v. *Ganaway*.....148

3. Where claims are placed in the hands of a third person, to collect and pay over to the creditors of the proprietor, an action for the failure to collect them, and pay over the amount, may be maintained by the latter—the creditors being no parties to the arrangement, or their demands being paid by him.—*Mardis' Adm'rs* v *Shackleford*.....433

4. A judge of the county court is authorized to issue the writ of *habeas corpus* in all cases where the detention is claimed by virtue of civil process, and is empowered to judge of its validity in every aspect; he is therefore not liable to an action for discharging a debtor arrested on a *ca. sa.*—*Morrow & Nelson* v. *Bird.* 834

See Execution, Writ of, 5.

See Frauds, Statute of, 4.

See Partners and Partnerships, 10.

ACTION, QUI TAM.

1. An action of debt *qui tam*, to recover the penalty for issuing a marriage license to a minor, without the consent of his parent or guardian, is abated by the death of the plaintiff, so that it cannot be revived by his personal representative.—*Quere*—Wether it might not have been continued by the State.—*Fairley* v. *Davis, Adm'x*.....375

ADMIRALTY PROCEEDINGS.

1. The lien given on a steam-boat, by the act of 1836, for failing to deliver goods as specified in the bill of lading, continues until the first day of July next after the non-delivery, according to the terms of the bill.—*Steamboat Robert Morris and owner* v. *Williamson*.....50

2. The lien thus created, when goods are damaged, is not waived by their acceptance by the consignee or owner; nor by a receipt specifying that they have been received in good order. To make a waiver there must be a knowledge of the injury, and an intention to abandon a remedy; or some contract which is inconsistent with the existence of the lien.—*Ibid*.....50

ALTERATION OR ERASURE.

1. The addition of the words "without defalcation or set-off," to a promissory note, without the consent of the maker, is a material alteration, but if made by a stranger, without the knowledge or consent of the payee or holder, will not vitiate the note.—*Davis* v. *Carlisle*.....707

2. If it be shown that the alteration has been made, but it is not proved by whom, the jury may, in the absence of proof to the contrary, infer that it was made by the payee or holder, but the court cannot draw such inference as matter of law.—*Ibid.*.....707

AMENDMENT.

1. Where a judgment by default is rendered against the drawer of a bill of ex-

AMENDMENT—*continued.*

change payable in another State, which includes the charge of protest, without any proof of what the law authorizes therefor, the judgment is not reversible, but will be amended as for a clerical misprision under the act of 1824, by excluding the notarial fees.—*Crawford* v. *The Branch Bank at Decatur*.....574

2. It is discretionary with a court to permit a garnishee to amend his answer, and that even after an issue has been tried between the plaintiff and one to whom the debt attached is supposed to be transferred.—*Buford* v. *Welborn*. 818

3. A mistake of the clerk in stating the parties in the minutes of the judgment entry, is a clerical misprision, amended by other parts of the record.—*Patterson & Hinson* v. *Burnett, Adm'r*.....844

See Appeals and Certiorari, 6.

APPEALS AND CERTIORARI.

1. In an appeal case, where the judgment is for a less sum than twenty dollars, it is error to render a final judgment by default, unless the debt is ascertained by a writing. In other cases, the facts must be examined by the court, and its judgment given on them.—*Kenum v. Henderson*.....132

2. A stranger to a judgment or decree of the orphans' court, cannot carry it by *certiorari* to the circuit court; and if the circuit court should determine on the errors assigned, its judgment will be reversed and remanded, that the order granting the *certiorari* may be quashed; and this may be done on the application of the party at whose instance the cause was removed into the circuit court. *Watson, Adm'r v. May*.....133

3. Where sixteen judgments, between the same parties were rendered by a justice of the peace, and removed by *certiorari* to the county court, it was competent for the court to direct that but one bond should be executed, as the condition on which the *certiorari* and *supersedeas* should issue.—*Cooper v. Maddan*.....431

4. Where several suits are depending between the same parties, on appeal or by *certiorari* from the judgment of a justice of the peace, the court may, at the instance of either party, direct a consolidation, unless the party objecting can show that he will in some way be prejudiced thereby.—*Ib*.....431

5. When a suit is commenced by one for the use of another, in a justice's court, and an appeal is taken by the plaintiff, it is no defect if the name of the nominal party is omitted in the appeal bond.—*McBarnett and Kerr* v. *Breed*. 476

6. The surety in an appeal bond is only liable to the extent of the penalty of the bond, and when that is only 5 25-100 dollars, this court will judicially notice that the costs must exceed that sum. It will therefore correct the judgment as a clerical mis-entry, and amend it so as to render judgment, against principal and surety, for the costs, not exceeding the penalty, and for the excess against the principal only, at the costs of the plaintiff in error.—*Ib*.....476

7. The bond required to be executed upon the prosecution of an appeal from a judgment rendered by a justice of the peace, is, only a means provided by statute for the continuance of the litigation in the appellate court, and does not impose upon the sureties an obligation other and greater than that to which the appellant is liable: consequently, where one sued as administratrix, appeals, she

APPEALS AND CERTIORARI—*continued.*

may plead that the estate she represents has been declared and adjudged insolvent, and if her plea is sustained, no judgment can be rendered against her sureties on the appeal bond.—*Lansford, use, &c.* v. *Baskins' Adm'x*.....512

8. The Circuit Court may take jurisdiction by *certiorari*, of a case in which the intendant of a corporate town has rendered a judgment against a person resident within the same, for the violation of one of its by-laws.—*The Intendant and Council of the town of Marion* v. *Chandler*.....899

See Error, and Writ of, 19.

ARBITRATION AND AWARD.

1. Where a case, in which the amount in controversy exceeds fifty dollars, is submitted to arbitration, upon the order of a justice of the peace, under the act of 1824, if one-half of the referees sign an award, is it competent to show that some of the others who did not sign it, gave their assent to it; or if the award is so defective as not to conclude in itself the controversy submitted, can it be assisted by parol proof?—*Hubbert* v. *Collier, by his next friend, &c.* 269

2. Where a plaintiff, suing by a *prochein ami*, describes himself in the writ and declaration, as an infant under the age of twenty-one years, and the defendant pleads "not guilty," and "accord and satisfaction," the pleadings admit the plaintiff's infancy; and in such case, a submission to arbitration and award not being obligatory on him, may be rejected as evidence.—*Ib.*.....269

ASSUMPSIT, ACTION OF.

1. L, K and B are co-sureties for a defendant in a detinue bond, conditioned to deliver a slave in the event of a recovery: pending the suit, L desires K, in whose possession the slave has remained, to deliver the same to the sheriff in discharge of the bond. K refuses, and afterwards delivers the slave to the defendant in the detinue suit, by whom it is run off, and thereby the sureties have to answer on the bond. The slave is afterwards regained, through the exertions of L and B, and sold. The proceeds, when divided between L, K and B, fall short of the sum paid by them. If the slave had not been eloigned, it would have sold for a greater price: *Held*, that these circumstances did not warrant an action of assumpsit, by L against K, and that the evidence was properly excluded in that form of action.—*Long* v. *Kent*.....100

2. A recovery on a count for money had and received, cannot be had on proof that the administratrix of one executing a receipt for the collection of several claims, paid on demand, one of the claims, and refused further to account or to explain the other items of the receipt.—*Baskin, Adm'x* v. *Sample*.....255

3. To recover on the money count, it is necessary to prove that the money has been received, or at least some proof must be made from which such an inference can be drawn.—*Ib*.....255

4. Where an intestate, at the time of his death, had an account with a bank, as the depositor of money, and the administrator deposited in the bank his letters of administration, which entitled him to check for the money, though he permitted it to remain there to intestate's credit: *Held*, that there was not such a reception, or control of the money, as made the administrator liable, indivi-

ASSUMPSIT, ACTION OF—*continued.*

dually, to an action *for money had and received.—Calvert v. Marlow, surviving partner, &c.* 337

5. *Semble*: An action of *assumpsit* cannot be maintained by a surviving partner against the representative of a deceased copartner for the recovery of a debt due by the latter to the firm, or for money in hand at the time of his death; unless the partnership accounts have been settled, and a balance struck. The remedy in such case, is in equity.—*Ib.* 338

6. An agent acting for a known principal, and receiving money in that character, is not individually responsible if the money has been paid over to his principal without notice. Therefore, when a county clerk collects money by order of the commissioners' court, he cannot refuse to pay it over to the county treasurer, although it has been illegally assessed, unless it had been previously demanded of him by those from whom it was received.—*Thompson* v. *Stickney* 579

See Chattels, Sale of, 1.

See Corporation, 4, 5.

See Court, charge of, 3.

ATTACHMENT.

1. The want of a bond and affidavit, in a suit commenced by attachment, must be taken advantage of by plea in abatement; and it does not vary the case, that the attachment is sued out against a non-resident.—*Jones* v. *Pope*—*Wafer* v. *Pope* 154

2. On the trial of an issue between the garnishee and plaintiff in attachment, the fact of the indebtedness of the defendant to the plaintiff, is not involved.—*Ib.* 154

3. A sum of money produced by the sale of the effects of a defendant in execution, remaining in the hands of a constable, after satisfying executions against the defendant, is subject to be attached; and it is no defence to the garnishee process that the defendant in execution has commenced proceedings against the constable for the recovery of the surplus so remaining with him.—*King* v. *Moore* 160

4. The act of 1833, which requires the officer taking a bond on the levy of an attachment, in the event of its condition being forfeited, to indorse the fact on the bond, is not so imperative in its requirements, as to subject the officer to a judgment on motion, unless he was informed that a bond was taken and lodged in the clerk's office; and even after such information given, he will be allowed a reasonable time to make the indorsement.—*McGee* v. *Childers* 196

5. The defendant in attachment cannot object, on error, unless the point has been regularly made in the primary court, that the bond executed by the plaintiff is defective, although the record does not show that the defendant had actual notice of the pendency of the suit previous to judgment.—*Fleming, Linn & Co.* v. *Burge* 373

6. The affidavit of a plaintiff in attachment need not disclose the cause, or evidence of defendant's indebtedness, whether by bond, note, &c.; the statute merely requires him to "swear to the amount of the sum due."—*Ib.* 373

ATTACHMENT—*continued.*

7. In an attachment against a non-resident debtor, no publication is necessary, where a judgment is not rendered until more than six months after the suit was commenced.—*Ib* 373
8. The sheriff's return to an attachment, stating that he had levied the same on four horses, (describing their colors,) *as the property of the defendant*, is sufficient.—*Ib* 373
9. In an attachment by one non-resident against another, the affidavit should show that the defendant has not sufficient property within the State of his residence to answer the debt, within the belief, as well as within the knowledge of the person making the affidavit; and such a defect is sufficient to abate the attachment, when pleaded.—*Cobb* v. *Force, Brothers & Co.* 468
10. A landlord, upon making the affidavit prescribed by the 2d section of the act of 1843, is entitled to the process of attachment, and it is not necessary that it should be stated that the attachment is not sued out for the purpose of vexing or harrassing the defendant.—*Hawkins v. Gill* 620
11. The design of the act was to make the landlord's *lien* on the crop more effectual; the attachment, therefore, is properly issued against the crop grown on the land.—*Ib* 620
12. The absence of a debtor from the State, does not subject his property to attachment upon the allegation, that he absconds or secretes himself; and his neglect to inform a creditor of his intended absence, does not, *per se*, authorise the latter to resort to that extraordinary remedy.—*Pitts* v. *Burroughs.* 733
13. Where the sheriff returns an attachment, levied on certain lands in the possession of a person not a party to the writ, it will be intended, in order to sustain the proceeding, that they were the property of the defendant, and levied on as such.—*Lucas & Brooks v. Godwin* 831

See Evidence, 34, 35.

See Statutes, 9.

BAILMENT.

See Master and Servant, 1.

BANK.

1. The Bank is not affected by a conditional execution of a note by a surety, of which it has no knowledge.—*Findley* v. *The State Bank* 244
2. When a note is offered to a Bank for discount, and refused, unless an additional surety is given, which is not done, and afterwards, the note is put in suit by the Bank—*Held*, that the Bank, to show title in the note, must prove that it was afterwards discounted, and the money received by the principal, or carried to his credit, in the extinction of an old debt. Leaving the note with the officers of the Bank, is a repetition of the offer to discount.—*Ibid* 244
3. Proof that the old debt was extinguished, would be evidencee *prima facie* of the acceptance and discount of the note by the Bank.—*Ibid* 244
4. The certificate required to be made by the president of a bank, that the debt is really and *bona fide* its property, may be made at the trial or at any time before judgment.—*Ford, and others,* v. *The B. B. of the State of A. at Decatur.* 286

ATTACHMENT—*continued.*

5. The act of the Legislature, incorporating the Planters' and Merchants' Bank, is a public statute, and will be noticed judicially by the courts, though not specially pleaded.—*Crawford, et als.* v. *The P. & M. Bank of Mobile.* 289
6. The act of 13th February, 1843, for the settlement of the affairs of the Planters' and Merchants' Bank continues the charter of the Bank in existence, for the purpose of maintaining suits whether commenced before or after the charter was *declared forfeited.—Ibid.*.....290
7. To authorise the rendition of judgment by motion in favor of the Planters' and Merchants' Bank of Mobile, it is not sufficient to produce to the court the certificate of one assuming to be the President of the Bank, or a commissioner under the act of 1843, that the debt is the property of the bank, but the official character of the persons so assuming to act, must be proved, and the genuineness of their signature. It must appear from the record that such proof was made to the court, although an issue in fact be tried and found for the plaintiff. —*Ibid.*.....290
8. It is not necessary to prove that the certificate was made at the time it bears date; proof of the genuineness of the signature will be *prima facie* evidence of the contents of the certificate.—*Ibid.*.....290
9. The State Bank is a mere corporation, not invested with the attributes of sovereignty, and like an ordinary creditor must cause a claim, of which it is the proprietor, to be presented to the administrator of a deceased debtor, within eighteen months after the grant of administration.—*The Bank of the State of Alabama* v. *Gibson's Adm'rs*.....814

See Costs, 2.

See Indorser and Indorsee, 1.

See Judgment, 11.

See Pleadings, 58, 59, 61.

See Variance, 4, 5, 6.

BANKRUPT AND BANKRUPTCY.

1. A promise by a bankrupt "that he had been decreed a bankrupt, but still intended to pay the note—that he considered it a debt of honor, and though discharged as a bankrupt, he did not intend to avail himself of that advantage, but had some work engaged, from the proceeds of which he intended to pay the plaintiff," is not an absolute but a conditional promise, and to recover upon it it is necessary to show that the state of things existed upon the happening of which the promise to pay depended.—*Dearing* v. *Moffitt*.....776

See Error, Writ of, 20.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. The drawer of a foreign bill of exchange is liable upon it, according to the law of the place where the bill is drawn.—*Crawford* v. *The B. B. at Mobile.* 12
2. When a bill of exchange is drawn in Alabama, upon a person in Washington City, the drawer is liable, upon its dishonor, to pay the damages, and interest provided by the law of this State.—*Ibid.*.....12
3. An instrument, purporting to be a bill of exchange, which does not direct to whom the money is payable, may be the foundation of a suit, in the name of the

BILLS OF EXCHANGE AND PROMISSORY NOTES—*continued.*

person from whom the consideration moved, and to whom it was delivered by the drawer; but an action cannot be maintained thereon, by a third person, as bearer.—*Prewitt* v. *Chapman*.....86

4. A promissory note, payable in bank, is, by the statute, governed by the rules of the law merchant, as to days of grace, &c.—*Tarver'e Ex'rs* v. *Boykin*. 353

5. A writing, acknowledging that there is due from the subscriber to the person therein named, a certain sum of money, and stating for what cause it is due, is a promissory note, and a final judgment, by default, may be thereon rendered. —*Fleming, Linn & Co.* v. *Burge*.....373

6. When a judgment is obtained upon an assigned note, the note has lost its negotiable quality, and cannot again be assigned, so as to enable the assignee to sue in his own name.—*Scrayer* v. *Bradford, assignee*.....572

7. Where a bill drawn in this State is payable abroad, if dishonored either by non-acceptance or non-payment, the drawer is liable to pay interest according to the laws of the State.—*Crawford* v. *The Branch Bank at Decatur*.....574

8. The notarial fees attending the protest of a bill of exchange, are chargeable upon the drawer; but to authorize a judgment for these fees where a bill is payable and protested abroad, the legal charge for this service should be proved.—*Ibid.* 574

9. A note promising to pay 193 50-100 dollars, in four instalments of 6, 12, 18 and 24 months, may be put in suit before a justice of the peace, when one instalment only is sued for.—*Winston, et al.* v. *Majors, et al.*.....659

10. H. in consideration of the promise of L. to pay a certain note due from H. to another person, executes his notes to L. for the same sum. L. commenced suit against H. before the note was paid: *Held*, that the payment of this note was not a condition precedent, to be performed before L. could recover on the notes of H.—*Logan v. Hedges*.....699

11. Upon a suit on a note payable *on demand*, at a particular place, it is not necessary that the plaintiff should prove a demand at the place before suit brought. It is matter of defence for the defendant, if he was ready at the place, to pay.—*Montgomery* v. *Elliott, use, &c.*.....701

12. The drawees of a bill who refuse to accept it, may sue upon it after being dishonored. Until acceptance, they are strangers to the bill, and may acquire rights to it, and stand in the same condition as any other holder. The legal presumption arising from the possession of the bill by the drawee before its maturity, or after its dishonor, is, that a consideration has been paid by him to some other lawful holder, but this presumption may be rebutted by shewing that he took up the bill as drawee, or obtained it from the drawer.—*Désha, Sheppard & Co.* v. *Stewart*.....852

See Bank, 2, 3.

See Chancery, 1.

See Consideration, 1.

See Demurrer to Evidence, 1.

See Evidence, 3, 4.

See Feme Covert, 2.

See Indorser and Indorsee, 4, 6, 10.

BILLS OF EXCHANGE AND PROMISSORY NOTES—*continued.*

See Indorsement, 2, 4.

See Law Merchant, 1, 2.

See Trust and Trustee, 1.

BOND.

1. A bond of indemnity, given by the defendants to an execution, to the sheriff, to save him harmless against the consequences of levying on and selling the property of a stranger to the judgment, nor its satisfaction, is illegal, and void, and no action can be maintained by the sheriff upon it.—*Prewitt* v. *Garrett*.....128

2. When a bond is alleged to have been delivered as an *escrow*, and the evidence has no tendency to show that the condition of the delivery was communicated or known to the person to whom the delivery is made, the evidence may be rejected.—*Price, et al.* v. *Cloud*.....249

See Appeals and Certiorari, 7.

See Attachment, 4.

See Executors and Administrators, 9.

See Orphans' Court, 15.

See Pleadings, 47.

See Sheriff and Sureties, 11.

See Statutes, 2.

CASE, ACTION ON.

1. A count in case is good, which alleges that the plaintiff delivered to the defendant certain negroes to be hired out by him as auctioneer (upon a reasonable reward,) for twelve months, but to be delivered to the hirer upon his giving good security; and that the defendant did dispose of them to G. W. for that time, for $292, without security; in consequence of which the hire remains unpaid, and is wholly lost, &c.—*Blick* v. *Briggs*.....687

2. The declaration alleges that it was agreed between plaintiff and defendant that the latter would be G. W's surety for the sum of $292, for the hire of certain slaves, if the plaintiff would credit G. W. therefor; that the plaintiff, at defendant's special instance, &c. did give the credit, yet the defendant refused to become his surety; by reason whereof the said sum remains unpaid, and is and will be wholly lost to the plaintiff: *Held*, that the declaration discloses a cause of action, for which case will lie, and that it was not bad, because it did not aver the agreement was in writing.—*Ib.*.....687

CHAMPERTY, AND MAINTENANCE.

1 A conveyance of land, by one against whom the land conveyed was held adversely by claim of title, is void.—*Dexter and Allen* v. *Nelson*.....68

CHANCERY.

1. Where a bill single, not rendered negotiable by endorsement, is entrusted by the payee to an agent to collect, and he sells it for a fair and valuable consideration, to a third person, and he to another, who sues in the name of the payee, to his use, and obtains judgment, a court of equity will consider him a

CHANCERY—*continued.*

trustee for the payee, and compel him to account for the proceeds.—*May, et al.* v. *Nabors*.....24

2. A court of equity has no jurisdiction to relieve a debtor from applying for his discharge, under the act to abolish imprisonment for debt, on the ground that he has removed his property from this to another State to avoid paying his creditor. The right to a discharge is a legal question with which a court of equity has nothing to do.—*Croom v. Davis, et al*.....40

3. In a case, in which chancery has jurisdiction, for the purpose of relief, the nominal and real plaintiff may be made defendants to a bill, and the former, if a competent witness, examined under an order of the chancellor, at the instance of the complainant.—*Vickars, use, &c.* v. *Mooney*.....97

4. Where a deed conveys to trustees, for the use of a daughter, an undivided moiety of real and personal estate, of great value, the grantor and trustees cannot assent to a division of it, through the medium of arbitrators, so as to prevent the creditors of the former, from selling, under execution, his moiety of any part of the property. But it is competent for a court of chancery to cause a division to be made, or to arrest the action of the execution, until the rights of the *cestui que trust* are equitably adjusted.—*Thomas and Howard, Trustees, &c.* v. *Davis*.113

5. When a bill is filed to restrain a suit at law, on grounds of defence which could be available at law, if sustained by sufficient evidence, and it is alleged in the bill that the facts constituting this defence can only be established by evidence from the defendants to the bill;—this is a bill for discovery merely, and on the coming in of the answer of the defendant, denying the equity, it is proper for the chancellor to dismiss the bill when he dissolves the injunction.—*Steele* v. *Lowry and McGhee*.....124

6. The statute empowering courts of equity to proceed against absent defendants, invests those courts with jurisdiction over bills for discovery, in aid of the prosecution, or defence of a suit pending in any of the courts of law of this State, or with respect to property within it.—*Arnold* v. *Sheppard*.....299

7. It is not necessary in suits against absent defendants to prove the allegations of the bill, when it is taken *pro confesso*. The enactment which requires proof, only applies to suits against resident defendants.—*Ib*.....299

8. When the ground for equitable relief against an absent defendant is, that the note prosecuted by him in the court of law has been paid, and the fact of payment is solely within his knowledge, the court may decree relief upon the allegations of the bill, after a decree *pro confesso*.—*Ib*.....299

9. Where the bill in a chancery suit is so uncertain in its allegations that it cannot be ascertained from the bill who are the necessary parties to the suit, it will be bad on general demurrer.—*Whitaker, et als* v. *Degraffenreid*.....303

10. Parties having no interest in the matter in controversy cannot be joined with others that have; therefore, where sureties joined as complainants with their principal in a bill to coerce payment of the debt for which they were bound from a third person, the bill should be dismissed.—*Ib*.....303

11. In less than two months after the grant of administration, the administrator was served with a *scire facias* to revive a suit at law pending against the intestate at the time of his death; he retained counsel to appear for him, and claim a continuance. The counsel appeared on the first day of the term, and objected

CHANCERY—*continued.*

to a judgment against his client: on some subsequent day of the term, without the knowledge or consent of the administrator or his counsel, a judgment was rendered against the former, though the case was not reached in a regular call of the docket; and neither of them had notice of the judgment until after the adjournment of the court. The administrator reported the estate insolvent, according to the statute in such case; his report has been confirmed, and the appropriate orders made for its settlement. If the judgment remains in force, the administrator will be personally charged with its payment, although he has not wasted the estate of his intestate: *Held*, that it was competent for a court of equity to give relief, by injoining the judgment against the administrator.—*Smith* v. *Nelson*.....320

12. The purchaser of personal property may file a bill in the nature of a bill of interpleader, against his vendor and a third person who claims a right to the same, or seeks to avoid the vendee's title, and pray the decree of the court upon the conflicting claims, that he may be secure in the payment of the purchase money.—*Durden's Adm'r, et al. Burns' Adm'r, and another.* 362

13. The Decatur Bank, by its agents, entered into an agreement to take a tract of land belonging to B, one of its debtors, "at its fair cash value," to be ascertained by five persons who were selected by the parties—the land to be paid for by the debt due the bank from B; and the residue in the notes of the Bank of the State of Alabama—The persons agreed on, estimated the value of the land at thirteen dollars per acre, payable in Alabama bank notes, which were then at a discount of from twenty-five to thirty per cent.—*Held*, that the true construction of this contract was, that the land was to be taken by the bank at its cash money value in the market, and that the notes of the Bank, and the debt of B. were to be considered as money in payment of the land—that a court of chancery would not enforce a specific performance of the contract, because, by the mode adopted to ascertain the cash value of the land, the debt of B. and the notes of the Bank were not considered as money, but were, in effect, scaled by the supposed difference between them and specie, by the appreciated price put upon the land, over and above its supposed value in money; thus defeating the entire object of the Bank in making the contract. *Blevins & Horton* v. *The Bank at Decatur*.....377

14. The bill alleged, that the complainant and defendant were appointed executors of the will of J. M., and were qualified, and received letters testamentary as such; that defendant became the surety of one F. in a promissory note, payable to the executors, given for property of the testator's estate, purchased by F.; that a judgment had been obtained thereon, and execution returned "*nulla bona;*" F. was insolvent, and M's estate had been so reported and declared; that the defendant had removed to a distant county of the State, some ten or twelve years ago, had ceased to take an active part in the execution of the will, and that duty devolved upon the complainant: *Held*, that these facts did not give a court of equity jurisdiction, and if proved, would not authorise a decree in favor of the complainant against the defendant, as the surety of F.—*King* v. *Shackleford*.....423

15. The case of Johnston v. Glascock and wife, [2 Ala. 218,] reviewed and affirmed as to the necessary allegations in a bill filed to set aside a will admitted to

CHANCERY—*continued.*

probate by the county court.—*Johnston, Adm'r, et al.* v. *The Heirs of Hainesworth*.....443

16. The bill alleges that the person entitled to a life-estate in slaves, is greatly indebted, judgments for a large amount have been recovered against him, and other suits are still pending; he has made an assignment of much valuable property; complainants have been informed that he is preparing to remove the slaves, and they are apprehensive they will be levied on, pass into the hands of strangers, and be carried without the State, so that they will lose their rights, or be compelled to assert them in a foreign jurisdiction; that he has been arrested in Georgia on several *ca. sa's.*, given bond and security to take the insolvent oath, to comply with the condition of which, and obtain his discharge, he will be compelled to deliver up the slaves; that a third person has interposed a claim to them, which is now litigated with some of the creditors of the person entitled to the present interest: *Held*, that these allegations show such a danger of loss of the slaves, as to authorise a court of equity to entertain a bill *quia timet*, at the suit of those entitled in remainder.—*Lewis, et al. by their next friend*, v. *Hudson and another*.....463

17. When the answer alleges that the complainants appeared to and defended a motion to render judgment against them as sureties to a sheriff's bond, although this fact, if true, would present a bar to relief in equity, yet it can only appear by the production of the record in aid of the assertion: and the injunction should not be dissolved on the assertion merely.—*McClure, et al.* v. *Colclough, et al*.....492

18. When the sureties of a sheriff, against whom a judgment, on motion, has been rendered, have filed their bill putting either the *factum* or legal sufficiency of the bond in issue, the injunction should be retained until the determination of the issue, or until the production of a record, by which the questions at issue are concluded.—*Ib*.....492

19. It is no ground for resort to a court of equity by sureties on a writ of error bond, that the judgment had previously been affirmed on another writ of error, of which fact they were ignorant. If the second affirmance was irregular, they should apply to the court rendering it, to correct the irregularity.—*Ib*.492

20. Where the parties have settled their accounts and struck a balance, which has been adjusted by cash, or with a security for its payment at a future day, it is incumbent upon the party complaining of fraud or mistake, by suit in chancery, to allege it specially in his bill, and to establish the allegation by proof; and the agreement by the parties that errors should be corrected, does not relieve the complainant from the *onus* of proving a mistake.—*Langdon, et al.* v. *Roane's Adm'r*.....518

21. *Semble:* That the enforcement of a contract may be prevented, by showing a fraud on the part of him who seeks to derive a benefit from it, unless the fraud has been assented to, or acquiesced in; but a party cannot as the actor in a suit in equity, avoid a security which he has given for a debt clearly due, because he was induced to give it by the false representations of the creditor, made in ignorance of the facts, rather than from a settled purpose to deceive.—*Ib*.....518

22. The complainant is not entitled to relief upon proof, to the admission of which there is no allegation adapted.—*Ib*.....518

23. When upon a sale of land by parol, a considerable part of the purchase mo-

CHANCERY—*continued.*

ney is paid, and the vendee let into possession, who makes improvements, a court of chancery will decree a specific performance, at the suit of the vendee against a creditor of the vendor, upon the payment of the residue of the purchase money.—*Cummings' Heirs, et al.* v. *Gill's Heirs*.....562

24. No decree, except for costs, can be made in favor of a defendant upon his answer. If he seeks relief, he must do it by a bill of his own.—*Ib.* 562

25. A bill in equity must be certain, to a common intent, in respect to the case intended to be made by it, and the allegations in aid thereof; and if one who is not the mortgagee, files a bill for the foreclosure of a mortgage intended to secure several promissory notes payable to different persons, he must distinctly state that he is the assignee of all or such of the notes as he claims, so that his right to sue, and the character in which he sues, may be seen.—*Hartwell and Wilkins* v. *Blocker*.....581

26. Where a mortgage is executed to secure notes falling due at different periods, if a bill is filed by the holder of the last that matures, it should be stated whether those first payable were unsatisfied, and their proprietors made parties, if known.—*Ib*.....581

27. *Semble:* where a bill is defective for uncertainty, but the objection was not made in the primary court, an appellate court, in reversing the decree, will direct each party to pay his own costs.—*Ib*.....581

28. An allegation in a bill in chancery that a person had been sued to insolvency, is not established by proof that he had left the State insolvent.—*Pollard et al.* v. *Murrell*.....661.

29. The surety alleged in his bill, that the creditor indulged the principal *without the complainant's consent*; the defendant answered, that the indulgence was given with the surety's consent: *Held*, that the negative averment was not only proper, but necessary, yet it was pleading which it was not incumbent on the complainant to prove, but the defendant should prove the reverse, and his answer would not be evidence to establish the fact for him.—*Carpenter* v. *Devon, et al*.....718.

See Fraud and Fraudulent Conveyances, 5.

See Husband and Wife, 3, 4.

See Practice in Chancery, 2, 3, 4, 5, 6, 9, 10, 11, 12, 13.

See Sheriff and Sureties, 2.

See Trust and Trustee, 5, 6, 7.

See Vendor and Vendee, 2.

CHATTELS, SALE OF.

1. It is not error to refuse to charge a jury, in a suit for goods, bargained, sold, *and delivered*, that no recovery can be had unless a delivery is proved, if a contract of sale is proved; for the seller is not bound to deliver until the price is paid, and the common counts are sufficiently broad to permit a recovery on the contract of sale, without proof of delivery also.—*Kenan* v. *Starke and Moore*.....773

See Executors and Administrators, 6.

CONFLICT OF LAWS.

1. Where a bill drawn in this State is payable abroad, if dishonored either by

CONFLICT OF LAWS—*continued.*

non acceptance or non-payment, the drawer is liable to pay interest according to the laws of this State.—*Crawford* v. *The Branch Bank at Decatur*.....574

See Bills of Exchange and Promissory Notes, 1, 2.

CONSIDERATION.

1. Where a *feme* is sued on a promissory note made by her when covert, and she pleads her coverture in bar, it is not a good replication that she promised to pay the note after her husband's death, unless some new consideration or previous moral obligation is shewn to support the promise.—*Vance* v. *Wells & Co.* 737
2. "I bind myself to pay this note, if T. M. L. (the maker) does not," is a promise in writing, and as such, imparts a consideration, until it is shown to have none.—*Nesbit* v. *Bradford*.....747

See Vendor and Vendee, 2.

CONSTRUCTION.

1. Four spars were *hired* for an indefinite period, to aid in raising a steam-boat that was sunk, for the use of each, the owner of the boat was to pay one dollar a day, and if they were "lost or injured," he was to pay at the rate of twenty-five dollars each, for three of them, and ten for the fourth: *Held*, that the terms "lost or injured," were to be understood in a popular sense, and although they were not *actually lost or injured*, the owner of the boat might, if he retained them, upon paying eighty-five dollars, the price agreed, avoid the payment of hire for the use of the spars.—*Pope, et al. claimants*, v. *Murray*.489

CONTRACT.

1. An act of the Legislature was passed, providing for the improvement of the navigation of a river, and under its direction, three commissioners were elected, who were required to cause estimates of the work to be made, and adopt the cheapest and most practicable plan for its completion, by letting the same to contract, in divisions, &c. to the lowest responsible bidder. To insure faithfulness on the part of the commissioners, they were required to take an oath to discharge their duties to the best of their skill and ability; one of them took an interest in a contract, which the board let, for doing the entire work, and brought an action against one of the several contractors, to recover his proportion of the money which the defendant had received; *Held*, that the agreement, by which the commissioner was let into the participation of an interest in the contract, was against public policy, a fraud on the State, and could not be enforced.—*McGehee* v. *Lindsay*.....16
2. D contracts with P to pay him 600 dollars, for his services in superintending certain mills, for twelve months from the first of January, 1839...300 dollars to be paid on the first of June, and 300 dollars at the expiration of the year. P voluntarily left the service of D in December...In an action by P on the contract, averring a breach in the non-payment of said sums of money, or either of them—*Held*, to be no error to refuse to charge, that the plaintiff was not entitled to recover, as his right to the 300 dollars first to be paid, was clear, however it might be as to the other.—*Davis* v. *Preston*.....83
3. When the contract is to deliver plank on demand, it is necessary to make a demand, to put the party in default; and in a suit for the non-delivery, the material question would be whether a demand was made; it is difficult to conceive of

CONTRACT—*continued.*

perjury, in its legal acceptation, committed on such a trial, unless the swearing is, that no such demand was made, when, in fact, the truth was otherwise.—*McMurry* v. *The State*.....324

4. The corporation of Tuskaloosa made proposals for building a wall across a gully, which, among other things, provided that the work was to last for ten years, and required bond and security for the faithful performance of the contract. The work was undertaken by one J. W., who, with E. S. as his surety, executed to the corporation a penal bond, which recites most of the terms contained in the specification, and which was also attached to the bond, and concludes—Now, if the said J. W. shall do accordingly all matters and things as stated in said specification alluded to, and faithfully do and perform said undertaking or contract, in the best workmanlike manner, and in the shortest practicable time, then this bond to be void, &c. *Held*, that the surety was bound to the same extent as the principal, and was therefore liable on the bond for damages, the wall having been carried away by a freshet before the expiration of ten years.—*Ready and Banks, ex'rs*, v. *The City of Tuskaloosa*. 327

5. The Decatur Bank, by its agents, entered into an agreement to take a tract of land belonging to B, one of its debtors, "at its fair cash value," to be ascertained by five persons who were selected by the parties—the land to be paid for by the debt due the Bank from B.; and the residue in the notes of the Bank of the State of Alabama. The persons agreed on, estimated the value of the land at thirteen dollars per acre, payable in Alabama Bank notes, which were then at a discount of from twenty-five to thirty per cent.—*Held*, that the true construction of this contract was, that the land was to be taken by the Bank at its cash money value in the market, and that the notes of the Bank, and the debt of B. were to be considered as money in payment of the land—that a court of chancery would not enforce a specific performance of the contract, because, by the mode adopted to ascertain the cash value of the land, the debt of B. and the notes of the Bank were not considered as money, but were, in effect, scaled by the supposed difference between them and specie, by the appreciated price put upon the land, over and above its supposed value in money; thus defeating the entire object of the Bank in making the contract.—*Blevins & Horton* v. *The Bank at Decatur*.....377

6. Where claims are placed in the hands of a third person, to collect and pay over to the creditors of the proprietor, an action for the failure to collect them, and pay over the amount, may be maintained by the latter—the creditors being no parties to the arrangement, or their demands being paid by him.—*Mardis' Adm'rs* v. *Shackleford*. 433

7. Four spars were *hired* for an indefinite period, to aid in raising a steamboat, that was sunk; for the use of each, the owner of the boat was to pay one dollar a day, and if they were "lost or injured," he was to pay at the rate of twenty-five dollars each, for three of them, and ten for the fourth: *Held*, that the terms "lost or injured," were to be understood in a popular sense, and although they were not *actually lost or injured*, the owner of the boat might, if he retained them, upon paying eighty-five dollars, the price agreed, avoid the payment of hire for the use of the spars.—*Pope, et al. claimants*, v. *Murray*.....489

8. C. agreed to teach the school of the township, and the commissioners agreed to furnish a comfortable house, &c., and remunerate him with the "available

CONTRACT—*continued.*

funds" for one year; C. also stipulating "to pay five hundred dollars to support the female school, as an emolument for a tutoress." The agreement was dated 28th December, 1838; but did not provide when the school should be opened or closed: *Held*, 1. That C.'s contract required him to enter upon the performance of his engagement within a reasonable time after "a comfortable house" was furnished; or C. might provide a house for himself and relieve the commissioners from that duty. 2. That an allegation that C. had taught a school for the year 1839, as his contract required, and the "available funds" for that year amounted, &c. was sufficient, without stating the precise day when he should have been paid. 3. That it was the duty of the commissioners to employ the "tutoress," and C. need not allege that he had paid or tendered the sum agreed, to pay one. 4. That by the "available funds for one year" were meant the profits derivable from the capital during that time, whether received or not by the commissioners before the end of that period.—*Commissioners of section* 16, &c. v. *Criswell*.565

9. A note promising to pay 193 50-100 dollars, in four instalments of 6, 12, 18 and 24 months, may be put in suit before a justice of the peace, when one instalment only is sued for.—*Winston, et al.* v. *Majors, et al*.....659

10. A writing in these words, and signed J. D. S., viz: "Mr J. S. will apply to you for the rent and disposal of your building, now in charge of D. M.: any arrangement he can make with you as regards renting the same. I will be responsible for," is a direct and positive promise to pay, if the persons addressed would rent the house to J. S., and an action may be maintained thereon against J. D. S., without the necessity of a notice, or demand as required in case of a guaranty.—*Bates* v *Starr*.....697

11. P. exchanged two female slaves with R. for a negro man, and gave him a receipt acknowledging to have received from him $850 for the two slaves, which he warranted to be sound. Afterwards, R. insisting that one of the slaves was unsound, offered to rescind the contract, which P agreed to if R. would receive back the negro man, which he refused, and demanded the $850. R. having brought an action against P. on the warranty,—*Held* 1. That the receipt was open to explanation by parol proof showing what the contract really was. 2. That P. had the right to return the slave he had received, when the rescission was demanded, and that upon his failure to do so, the measure of damages would be the value of the slave at the time he received him, unless at the time of the exchange the parties estimated his value. 3. It was not necessary to a rescission that the plaintiff should offer to return the bill of sale.—*Pettus* v. *Roberts*.....811

See Bills of Exchange and Promissory Notes, 10.

See Covenant, 3, 4.

See Evidence, 25.

See Frauds and Fraudulent Conveyances, 6.

See Insolvent Debtor, 3, 4.

See Pleading, 27.

CONTRIBUTION.

1. When one co-surety has been compelled by suit to pay the joint engagement,

CONTRIBUTION—*continued.*

it is not competent for a co-surety, when sued for contribution, to show that the note, as between the principal debtor and the payee, was without consideration.—*Cave, use of Wallace*, v. *Burns*.....780

CONVERSION.

1. In an action on a sheriff's bond, one of the breaches, that the sheriff had before the return day of the *fi. fa.* settled the same with the defendant therein, discharged him from its payment, and thus made himself liable, &c : *Held*, that the generality of the breach was such, as to admit evidence to show that the act by which the execution was satisfied, was a conversion of the money to the sheriff's use; if such were the case, no demand need have preceded the institution of the suit, and the sheriff would be chargeable with interest from the time of the conversion, on the amount (saving the cost,) then due on the execution.—*Robbins, et al.* v. *The Governor of Alabama, use of, &c.* 839

CORONER.

See Process, and Service of, 1.

CORPORATION AND BY-LAWS.

1. When the name of a corporation is changed, it may sue in its new name, to enforce its former contracts, averring that they were made with it by its former designation.—*Ready and Banks, Ex'rs*, v. *The City of Tuskaloosa.* 328
2. The corporation is not liable for the acts of its marshal, unless done by its direction.—*Ib*.....328
3. The corporation having failed to pay the last instalment due for the work, it was competent for the defendant to prove this fact in mitigation of the damages.—*Ib* 328
4. Upon a note made payable to the "Treasurer of the Manual Labor Institute of South Alabama," a suit cannot be maintained by *Madison College*, without an averment that it is the same corporation, and that the name had been changed since the making of the note, and before the institution of the suit.—*The Madison College* v. *Burke*.....494
5. In such a case, on making the proper proof, a recovery can be had on the money count.—*Ib* 494
6. Where process against a corporation is returned as served upon one being president of the corporation, it is necessary that proof of his official character should be made to the court, and so appear on the record, to sustain a judgment by default.—*Wetumpka and Coosa Railroad Company v. Cole*.....655
7. The opinion of one of the commissioners appointed by an act of incorporation to receive subscriptions for stock, that a subscriber might forfeit his stock by failing to pay an assessmant thereon, can have no influence upon the liability of the latter; and in an action brought for the recovery of an assessment, is irrelevant testimony.—*Hall* v. *Selma and Tennessee Railroad Company*.....741
8. An act incorporating a town, authorized the enactment of by-laws "to restrain and prohibit every species of gambling, drunkenness, &c.; to grant licenses to the retailers of spirits and liquors; to regulate and restrain them when deemed a nuisance;" and to pass all such by-laws consistent with the constitution and laws of this State, as may be necessary, &c. Under this grant of power, the corporation passed an ordinance prohibiting the retailing of spirituous or fer-

CORPORATION AND BY-LAWS—*continued.*

mented liquors within the corporate limits, without first paying to its treasurer the sum of one thousand dollars for a license for one year; and for retailing without such license, a penalty of ten dollars a day was imposed, and made recoverable by warrant before the intendant, &c.: *Held*, that this by-law was authorized by the act of incorporation.—*The Town of Marion* v. *Chandler*.....889

See Stock, Subscription for, &c., 2, 3, 4.

COSTS.

1. A suit should not be dismissed for the omission of the plaintiff to give security for the costs, pursuant to a notice, if the plaintiff gives sufficient security at the next term of the court.—*Lyons* v. *Long*.....103
2. The judge of the county court of Tuskaloosa county, under the act of the 13th Feb. 1849, is authorised to tax a fee of two dollars on bank suits, although no jury trial is had.—*Ex parte The Bank of the State of Alabama*.....498
3. The notarial fees attending the protest of a bill of exchange, are chargeable upon the drawer; but to authorize a judgment for these fees where a bill is payable and protested abroad, the legal charge for this service should be proved.—*Crawford* v. *The Branch Bank at Decatur*.....574

COVENANT.

1. A general covenant of warranty of title in a conveyance of land, is not a covenant of *seizin*, but is equivalent only to a covenant for quiet enjoyment.—*Caldwell* v. *Kirkpatrick*.....60
2. Where an administrator makes a warranty of the soundness of personal property belonging to his intestate's estate, which he sells under an order of court, he is chargeable for a breach in his representative character.—*Craddock* v. *Stewart's Adm'r*.....77
3. A covenant to sue certain persons to insolvency, does not require a suit to be brought, if the person to be sued absconds from the State, and in such a case proof of the insolvency of the party will be sufficient.—*Pollard, et al.* v *Murrell*.....661
4. To establish the fact of insolvency under this covenant, it is not necessary to do more than to exhaust the usual remedies provided by law for the collection of debts—it is not necessary to sue out a *ca. sa.* since the passage of the act abolishing imprisonment for debt—or to proceed against the sheriff for a false return.—*Ib.*.....661

COUNTY TAX.

1. A mere verbal direction by the commissioners' court to the county clerk to collect thirty per centum on licenses, for county purposes, is not the imposition of a tax, nor does it invest the clerk with the legal authority to receive the money.—*Thompson* v. *Stickney*.....579
2. A license issued by the clerk of a county court, the tax upon which is required by the general law to be paid into the State treasury, must be so paid in, although the clerk, at the time he issued the license and received the money, did not know of the passage of the State law, and supposed he was acting under an order of the commissioners' court.—*Ib.*.....579

See Criminal Cases, Proceedings in, 13.

COURT, CHARGE OF.

1. Where the defendant pleaded several pleas, all of which were good, and the jury returned a general verdict in his favor, the plaintiff cannot object on error, that the court refused to charge the jury, that if they found for the defendant they should state to which of the pleas their finding applied.—*Kirk, et al.* v. *Suttle*.....680
2. The act of 1819, makes the "borrower or party" to a usurious contract, a competent witness to prove the usury; but this statute cannot be so construed, as to authorise the indorser or surety of the "borrower or party," when sued, to be a witness to prove the fact, so as to defeat a recovery against him.—*Paul* v. *Meek*.....753
3. It is not error to refuse to charge a jury, in a suit for goods, bargained, sold, *and delivered*, that no recovery can be had unless a delivery is proved, if a contract of sale is proved; for the seller is not bound to deliver until the price is paid, and the common counts are sufficiently broad to permit a recovery on the contract of sale, without proof of delivery also.—*Kenan* v. *Starke and Moore*.....773

See Contract, 2.

See Ejectment, and Trespass to try Title, 6.

COURT, SUPREME.

1. A bill of exceptions may be suppressed, when it is shown that it was fraudulently or surreptitiously obtained; but the Supreme court cannot try the facts and determine what was the point reserved at the trial, nor can any admission made by the judge afterwards, affect the validity of the bill.—*Weir* v. *Hoss & Wife*.....881

COURT, CIRCUIT.

1. Under the act of 1829, the Circuit Court may appoint a trustee, upon the death of the trustee appointed in the deed.—*The State Bank* v. *Smith*.....75

See Jurisdiction, 1.

COURT, COMMISSIONERS OF ROADS AND REVENUE.

1. A mere verbal direction by the commissioners' court to the county clerk to collect thirty per *centum* on licenses, for county purposes, is not the imposition of a tax, nor does it invest the clerk with legal authority to receive the money. —*Thompson* v. *Stickney*.....579
2. A license issued by the clerk of a county court, the tax upon which is required by the general law to be paid into the State treasury, must be so paid in, although the clerk, at the time he issued the license and received the money, did not know of the passage of the State law, and supposed he was acting under an order of the commissioners' court.—*Ib*.....579
3. The offence of keeping a house of public entertainment for travellers, either in town or country, without first obtaining a license therefor from the county court, is punishable by indictment or presentment, although spirituous liquors be not retailed in the house; but no tax can be demanded on granting a license to keep a house of public entertainment, unless it be in a city or incorporated town or village....*The State* v. *Cloud*.....628

CRIMINAL CASES, AND PROCEEDINGS IN.

1. A commission cannot issue, according to the common law, to take the deposition of a non-resident witness, at the instance of the defendant in a criminal case; and there is no statute in this State authorizing such a procedure.—*Ex parte Harkins*.....63
2. A finding by the jury that the prisoner is guilty on the first charge, when the indictment contains more than one count, will be considered as affirming that he is guilty, as charged in the first count of the indictment, and not guilty as charged in the other counts.—*Nabors* v. *The State*.....200
3. One may be convicted and sentenced on an indictment for stealing a slave, as a case of grand larceny, where its value exceeds twenty dollars, and the offence is not attended with the circumstances of aggravation, specified in the 18th section of the 4th chapter of the penal code, before it was repealed and re-enacted in other terms.—*Ib*.....200
4. When the term of a circuit court is limited to one week, it expires on Saturday night at 12 o'clock, as no judicial action can be had on Sunday, and a verdict rendered after that hour, is irregular, and and will not sustain a conviction.... *Ib*.....200
5. An indictment for perjury, alleging that, in a trial of a suit between P. and M. before a justice of the peace, it became a material question, "whether M. on the —— day of ——, 1840, was ready to deliver on demand, certain plank to P. according to the contract between them;" on which trial M. swore "that he had the plank always ready for P;" meaning thereby that he had the plank ready to be delivered to P., according to the contract, on the —— day of ——, 1840, when, in truth and in fact, M. did not, on the —— day of ——, 1840, have the plank ready to be delivered to P. in accordance with the contract between them, is bad...*McMurry* v. *The State*.....324
6. When the contract is to deliver plank on demand, it is necessary to make a demand, to put the party in default; and in a suit for the non-delivery, the material question would be whether a demand was made; it is difficult to conceive of perjury, in its legal acceptation, committed on such a trial, unless the swearing is, that no such demand was made, when, in fact, the truth was otherwise.—*Ib*.....324
7. In a trial for perjury alleged to have been committed in giving evidence in a cause before a justice of the peace, growing out of a written contract, it is necessary that the record or papers of the suit and the contract, should be produced or accounted for; the first is necessary to show the identity of the proceedings with those described in the indictment; and the other, to ascertain the legal effect of the contract, and consequently what questions of evidence were material or otherwise in that suit...*Ib*.....324
8. An indictment under the second section of the fifteenth chapter of the penal code, for an assault with intent to kill, must, within the terms of the act, allege that the individual assaulted was a "white person;" and an indictment which does not contain such an allegation, cannot be aided by a verdict finding the fact affirmatively...*Nelson, a slave*, v. *The State*.....394
9. Although the tenth section of the fifteenth chapter of the penal code provides, that at least two-thirds of the jury who try a slave for a capital offence, shall

CRIMINAL CASES, AND PROCEEDINGS IN—*continued.*

be slaveholders, yet it will be regarded as sufficient on error, if the judgment entry characterize the jury in such case, as "good and lawful men."...*Ib*.....394

10. When a slave is indicted for an assault on a white person, with intent to kill and murder, and the verdict is "guilty of an assault with intent to kill" only, this will be considered as a finding of guilty of an assault with intent to kill, but not guilty of an intent to murder.—*Nancy, a slave*, v. *The State*. 483

11. When a verdict is that a defendant is "guilty of an assault with intent to kill," without any other words, it will be referred to the charge in the indictment.—*Ib*.....483

12. It is a capital offence for a slave to assault a white person with intent to kill, although if the intention had been consummated, the killing would have been manslaughter only.—.....483

13 The offence of keeping a house of public entertainment for travellers, either in town or country, without first obtaining a license therefor from the county court, is punishable by indictment or presentment, although spirituous liquors be not retailed in the house; but no tax can be demanded on granting a license to keep a house of public entertainment, unless it be in a city or incorporated town or village.—*The State* v. *Cloud*.....628

14. Although the charter of the city of Montgomery provides that retailers who procure a licence from the city council shall be exonerated from paying any thing to the county for the privilege of retailing in the city, yet it does not relieve them from the necessity of obtaining a licence from the county court as required by the acts of 1835 and 1839.—*The State* v. *Estabrook*.....653

15. An indictment upon the statute, which charges both the *cruel* and *unusual* punishment of a slave, is not bad, for duplicity.—*Turnipseed* v. *The State*. 664

16. Although the statute declares in general terms, that "No cruel or unusual punishment shall be inflicted on any slave," yet it is not enough that an indictment should merely pursue the words of the act; but it should allege what punishment was inflicted, and how.—*Ib*.....664

17. The court has the power, after a conviction for a felony, to grant a new trial, with the consent of the prisoner, and the verdict and judgment will be no bar to his being again tried for the same offence.—*The State* v. *Slack*.....676

18. It is an essential constituent of the crime of rape that the act should have been committed by force, and against the will of the female.—*The State* v. *Murphy*.....765

19. A conspiracy to commit an offence is not merged when the conspiracy is executed, where the conspiracy and the act done are misdemeanors of the same grade; but the indictment may be framed with a view to the punishment of either.—*Ib*.....765

20 The Judge of the county court is not authorised to award a *habeas corpus* to bring before him the body of a prisoner committed for a felony; but if he does so, and remands the prisoner, because he is unable to give bail, the imprisonment may be referred to the original warrant for his detention, and he will be considered legally in custody.—*The State* v *Guest*.....778

21. The evidence against one charged with an offence against the law, should be so convincing as to lead to the conclusion that the accused cannot be guiltless. If after subjecting the proof of guilt to the test of reason, there is still a doubt as to his guilt, it is the duty of the jury to acquit....*The State* v. *Murphy*.....846

CRIMINAL CASES, AND PROCEEDINGS IN—*continued.*

22. To constitute the offence of larceny, by entering into and stealing from a dwelling house, out house, &c. there must be an entry against the consent of the owner, unless the crime be meditated at the time of a permissive entry....*The State* v. *Chambers*.....855

See Indictment, 3, 5, 6, 7, 8, 9.

DAMAGES.

1. The corporation having failed to pay the last instalment due for the work, it was competent for the defendant to prove this fact in mitigation of the damages....*Ready and Banks, Ex'rs*, v. *The Mayor and Aldermen of the city of Tuscaloosa* 328
2. In trover, the measure of damages is the injury actually sustained; therefore, in an action brought for the conversion of a slave, if the plaintiff has but a life estate in the slave, the measure of damages is not the value of the slave, but the value of the plaintiff's interest in the slave....*Strong* v. *Strong* 345

See Contract, 11.

See Evidence, 43.

See Garnishment and Garnishee, 8.

DEED, AND REGISTRATION OF.

1. A deed, by which personal property is conveyed to trustees for the use of an infant child, is not a mortgage, deed of trust, or legal incumbrance, within the meaning of the act of 1823, "To prevent fraudulent conveyances;" and does not become liable to the debts of the party in possession, although the deed has not been recorded....*Thomas and Howard, Trustees, &c.* v. *Davis*.....113
2. A deed conveying the title to lands, is operative against the creditors of, or a subsequent purchaser or mortgagee, &c. from the grantor, from the time of its registration only, where it was not recorded within the time prescribed by the statute...*Mallory* v. *Stodder*.....801
3. At the time the creditor signed and sealed a deed of trust made for his benefit, there was a blank left for the description of the property (to which his debtor, the grantor had not then a legal title,) with the understanding that it was to be filled up, if the grantor perfected his title, executed and acknowledged it, and it was duly recorded, the deed from that time became operative in favor of the *cestui que trust*.....801
4. The assent of the grantee to a deed *beneficial to him*, will be presumed, although it may be recorded without having been executed by him ---*Ib.* 801
5. Where the grantor of lands has the evidence of a legal title and is in possession, his grantee cannot be affected by any notice which the former had, of an unregistered deed to a third person from the vendor of the grantor....*Ib.* 801
6. The cancellation of a deed to land will not revest the title in the grantor, but if the vendee delivers up his unregistered deed to be cancelled, he places it in the power of the latter either to sell or incumber the land; and a *bona fide* purchaser or incumbrancer without notice, would have the paramount interest; and this, although he did not acquire it directly from the vendor; but from one to whom the vendee delivered the deed under a parol contract for a sale, that he might exchange it with the vendor for a deed made directly to himself. *Ib*..... 801

DEMAND.

See Conversion, 1.

DEMURRER TO EVIDENCE.

1. When a bill is drawn on a firm by the name of D. S. & Co., and the suit is in the name of three persons as partners, using the same firm name of D. S. & Co., the bill only being in evidence will not warrant the conclusion, when the evidence is demurred to, of the identity of the plaintiffs as the drawees of the bill.—*Desha, Sheppard & Co.* v. *Stewart*.....852

DEPOSITION.

1. A commission cannot issue, according to the common law, to take the deposition of a non-resident witness, at the instance of the defendant in a criminal case; and there is no statute in this State authorizing such a procedure.—*Ex parte Harkins*.....63
2. The answers of a nominal plaintiff, to interrogatories, exhibited under the act of 1837, "more effectually to provide for discoveries in suits, at common law," are not admissible evidence against the party for whose use the suit is brought. —*Vickers, use, &c.* v. *Mooney*.....97
3. In a case in which chancery has jurisdiction, for the purpose of relief, the nominal and real plaintiffs may be made defendants to a bill, and the former, if a competent witness examined under an order of the chancellor, at the instance of the complainant.—*Ib*.....97
4. Under the act authorising discoveries in suits at law, it is no objection to the discovery sought, that it does not rest within the exclusive knowledge of the party required to answer; or that it is not shown that the matter cannot be proved by witnesses.—*Alston* v. *Graves & Hogan*.....174
5. When a party fails or refuses to answer interrogatories propounded under this act, the court is not authorised to consider the interrogatories as confessed, or to submit an account, exhibited with them, to the jury, without further proof than arises from the judgment by default, entered under the statute.—*Ib*.....174
6. Interrogatories, filed pursuant to the act of 1837, in order to obtain the plaintiff's testimony, may be served either on the plaintiff, *or his attorney;* and if not answered, the suit may be dismissed, or continued, with the view of obtaining answers.—*Jackson* v. *Hughes*.....257
7. Although a court may, under peculiar circumstances, suppress a deposition regularly taken, yet the refusal to do so is the exercise of a discretion which cannot be reviewed on error.—*Cullum* v. *Smith & Conklin*.....625
8. A commission to take a deposition was addressed to Thomas N. *Barnham* and William Carr, or either of them; it was executed by a person who signed his name Thomas N. *Barham: Held*, that the name being dssimilar, it could not be intended that the person certifying the deposition was one of those to whom the commission was addressed.—*Kirk, et al.* v. *Suttle*.....679
9. A deposition in the hand writing of the party taking it, cannot be read in evidence unless the opposite party was present consenting thereto.—*Steele* v. *Dart & Co.*.....798

See Evidence, 9.

DISCONTINUANCE.

1. If the Court improperly continues a cause, as to two out of three defendants by the express or implied assent of the plaintiff, and thereby the entire cause is discontinued, he cannot afterwards obtain a *mandamus*, to require the court to restore the cause to the docket.—*Comstock* v. *Givens*.....95

2. One joint maker of a promissory note cannot be called as a witness for the other with whom he is sued, although he makes no defence to the suit; for a verdict in favor of his co-defendant, would operate a discontinuance of the action, and even vacate the judgment if one had been rendered against him.....*Turner, et al.* v. *Lazarus*. 875

DOWER.

1. The provision for the wife is inconsistent with dower and distribution of the same estate; consequently, without any express legislation upon the subject, she would, in equity, be put to her election.--*McLeod, et al* v *McDonnell & Wife*. 236

2. The only change of law, made by our statute, which requires a widow to signify her dissent from the provision made for her by her husband's will, is to introduce a determinate period, within which she must signify her dissent, or else the provision, if in equity, a bar of dower, becomes absolutely a bar at law---*Ib.* 236

3. When application is made for an allotment of dower, and distribution of the personal estate, to the County court, which has possession of the will by probate, and the will is inconsistent with such claim, there is a defect of jurisdiction in the court to act upon the petition, unless the fact of dissent from the will, is shown affirmatively.—*Ib*.....236

4. A widow is not dowable as a matter of right, of the entire dwelling-house, out-houses, &c. in which her husband usually dwelt, &c, but to such part thereof as corresponds with her dower interest in the lands. If the estate be solvent, and it will not be unjust to the heirs, she may insist on the entire dwelling-house, out houses, &c., as being assigned as part of her dower, in *lieu* of a corresponding portion of her dower in the lands, equal in value to the portion of the dwelling-house, of which she is not dowable as a matter of right.—*Langdon* v. *Stephens*.....730

5. Until dower is assigned to the widow, she has no estate in the lands of her husband, but a mere right to occupy the mansion house, out houses, &c. until dower is assigned her....*Weaver & Gains* v. *Crenshaw*.....873

6. Whether an estate in dower would entitle the second husband to an exemption from suit, out of the county of his residence, *Quere?*---*Ib*.....873

EJECTMENT, AND TRESPASS TO TRY TITLE.

1. An order cannot be made in vacation, at the instance of a stranger to the judgment, to arrest the execution of a writ of *habere facias possessionem*, although, after its execution, if improperly turned out of possession, he may, in certain cases, on motion to the Court, be restored to the possession.—*Hall* v. *Hilliard* 43

2. Where one has been in possession of land for several years, built a house and made other valuable improvements thereon, the inference is, that his occupancy is legal, and that he has such an interest as may be sold under execu-

EJECTMENT, AND TRESPASS TO TRY TITLE—*continued.*

tion. The purchaser of land thus occupied, at a sale under execution, may maintain an action to recover the possession of the occupant.—*Doe ex dem. Heydenfelt* v. *Mitchell*. 70

3. When there are other heirs at law not joined in an action of trespass to try title, the objection, if good at all, can only be taken by plea in abatement.—*Bonner* v. *Greenlee's heirs* 411

4. An action of trespass to try title, must be brought against the tenant in possession, and it is no defence for him to show that he holds under a will for the benefit of others.—*Ib*.....411

5. In an action of trespass to recover the possession of land, the declaration may be in the usual form of trespass *quare clausum fregit;* the statute requires the indorsement on the writ to inform the defendant "that the action is brought as well to try titles, as to recover damages."—*Carwile* v. *House*.....710

6. Where an action is brought to recover the possession of several adjacent tracts of land, which the plaintiff claims as a purchaser under execution, with a sheriff's deed, it is error to charge the jury that if the defendant was in possession of any parcel or tract of the land in question, they should find for the plaintiff for all the lands lying contiguous thereto, described in the declaration and the sheriff's deed.—*Ib*.....710

See Landlord and Tenant, 1, 2.

ELECTION.

See Dower, 2, 3.

ENTRY.

1. An entry to re-vest an estate for a breach of a condition subsequent, must be such a notorious and unequivocal act as demonstrates the intention of the grantor to terminate the previous estate.—*O'Brien* v. *Doe ex dem. Henry*.....787

2. Where fourteen lots of land in Mobile, situate on opposite sides of a street, were conveyed by one deed, with a clause of forfeiture—*Held*, that an entry upon the lots on one side of the street, for a breach of the condition, was not of itself an entry upon the lots upon the other side of the street.—*Ib*.....787

3. A long possession by the grantor, acquiesced in by the grantee, might be sufficient to raise the presumption that the original entry was for a breach of the condition, but no such presumption can be made when the possession is recent, and especially where it is forcibly taken.—*Ib*. 787

4. When the grantor seeks to establish his right to enter for a breach of the condition subsequent, he assumes the burthen of proving it, though it consists of a negative; but in such a case slight proof would be sufficient, *prima facie*.—*Ib*. 787

ERROR, WRIT OF.

1. A defendant will not be permitted, in an appellate court, to raise a question of jurisdiction, by showing a fact, by affidavits, when the same matter is not disclosed by the record.—*Powers* v. *David*.....9

2. When the record discloses that a cause has been in court for three years, and has once been continued by consent, the judgment will not be reversed, although no service or writ appears in the transcript, and although the appearance of the defendant's attornies is on their motion stricken out. The proper course, if there

ERROR, WRIT OF—*continued.*

was no service or waiver, was for the defendant to explain the condition of the record, by affidavit, and ask its correction.—*Ethridge* v. *Fuller*.....58

3. The administrator of an intestate, against whom a judgment has been recovered, when living, is the proper party to sue out a writ of error, and may do so on application to the clerk. If he supersedes the judgment, it may be affirmed with damages, as in other cases.—*Headon* v. *Turner, Adm'r.* 66

4. When the decree of a chancellor ascertains and settles the rights of the parties in litigation, it is so far *final* as to sustain a writ of error, although the chancellor may refer the cause to a master to ascertain facts for an account. It will not vary the case that proceedings were afterwards had, and new parties made for a purpose not affecting the merits, but relating merely to the account to be taken. *The Bank of Mobile* v. *Hall*.....141

5. A final decree which will bar the prosecution of a writ of error, after three years is the last decree made in the cause.—*Ib*.....141

6. A writ of error can be prosecuted by him only, who is a party or privy to the record, or injured by the judgment; and who will consequently derive advantage from its reversal.—*The heirs and distributees of Hill* v. *Hill's Ex'rs*...166

7. Where certain persons describing themselves as sisters and brothers of the deceased, bring error to reverse an *ex parte* order, admitting the supposed will of the decedent, to probate, it cannot be intended (in the absence of any affirmation in the record,) that they are the nearest of kin in interest, and the writ of error will be dismissed.—*Ib*.....166

8. A writ of error will not lie, from an order of court, permitting a sheriff to amend his return to a *fieri facias;* the party prejudiced by such order has a remedy by *mandamus*, to cause it to be vacated.—*Kemp & Buckey* v. *Porter*.....172

9. Where the defendant goes to trial without objecting that there was no replication to a special plea, he cannot be allowed to make the objection on error. *Hubbert* v. *Collier, &c.*.....269

10. It cannot be objected, on error, that the declaration on which an issue was tried, was entitled of an improper term.—*Ib*.....269

11. After a verdict, in an action of trespass, the defendant cannot object to the declaration, that it alleges the trespass to have been committed on a certain month, without particularizing the day.—*Ib*.....269

12. A confession of judgment, by the defendant, of part of the plaintiff's demand, and a continuance of the residue, on his motion, is a consent on his part, to a severance of the claim, and it cannot afterwards be objected by him, on error, that two final judgments were rendered in the same cause.—*Henderson* v. *Henry*.....361

13. As it is a matter within the discretion of the court trying a cause, to grant or refuse a new trial, the refusal to grant it, on the ground that the motion therefor, was not made in due time, is not revisable *on error.—Hilliard, by next friend,* v. *Carr and Ketchum*.....557

14. Although a court may, under peculiar circumstances, suppress a deposition regularly taken, yet the refusal to do so is the exercise of a discretion which can not be reviewed on error.—*Cullum* v. *Smith & Conklin*.....625

15. Where it appears from a bill of exceptions that the plaintiff failed to make out his case, an appellate court will not, at his instance, reverse a judgment rendered against him, because the court expressed to the jury an incorrect opinion

ERROR, WRIT OF—*continued.*

upon the law, or gave an erroneous reason for a correct conclusion.—*Shepherd, et al.* v. *Nabors* 631

16. It is not regular for a defendant in error to docket the cause upon the production of the certificate and citation, and thereupon move to confess error. Until the record is filed by the plaintiff and errors are assigned, the defendant has no other rights than to move for an affirmance.—*Cherpin* v. *Tillotson.* 638

17. Where the transcript of the record shows a consent by the defendant, endorsed on the writ, to waive the declaration, and that the endorsement of the cause of action shall be used in place of it, a judgment by default will not be reversed because this consent does not appear from the record to have been proved to the court below. The proper course, if no such consent was given, is to apply to the court below to vacate the entry of consent and thus make the record in accordance with the fact.—*Humphrey's Adm'r* v. *Thompson* 649

18. Where the defendant pleaded several pleas, all of which were good, and the jury returned a general verdict in his favor, the plaintiff cannot object on error, that the court refused to charge the jury, that if they found for the defendant, they should state to which of the pleas their finding applied.—*Kirk, et al.* v. *Suttle* 680

19. A writ of error cannot be prosecuted upon the settlement of an insolvent estate, until a final decree is made, but any creditor who may conceive himself injured by a rejection of his claim, may, by *certiorari* remove the record into the circuit court, and have the question re-considered; and for the improper admission of a claim, the remaining creditors may also seek redress in the same mode.—*Cawthorne* v. *Weissinger* 714

20. A suit was instituted by A. for the use of L. & L., partners, and judgment rendered for the defendant. A. and one of the beneficial plaintiffs died, and the surviving partner took the benefit of the bankrupt law, after which a writ of error was prosecuted upon the judgment to this court. *Held*, that the writ of error must be dismissed, and could not be amended under the statute authorizing the amendment of writs of error.—*Armstrong, use, &c. Adams* 751

21. Where recognizors are bound in several sums in one recognizance, and several judgments are rendered against them, they cannot join in the prosecution of a writ of error; but where a joint writ is sued out by them, it may be amended under the act of 1843 "to authorize the amendment of writs of error," by striking out one of their names, and then it will remove the cause as to the other.—*Farr & Simpson* v. *The State* 794

22. An objection to the revival of a suit in the name of an administrator, can not be made in this court, if not raised in the court below.—*Patterson & Hinson* v. *Burnett, Adm'r* 844

23. The reading to the jury of an affidavit of the loss of an instrument, and *its contents*, will not prejudice the party on error, though irregular, if the witness gave oral testimony also to the jury, of the contents of the paper.—*Ib* 844

24. Where a declaration contains several counts, to one of which a demurrer is sustained, and on the others issues are tried, and verdict and judgment thereon for the plaintiff; if the demurrer was improperly sustained, the judgment will be reversed *in toto*, and not merely as to the count adjudged to be defective.—*Fontaine & Freeman, use, &c. Lee's Adm'rs* 889

ERROR, WRIT OF—*continued.*

See Appeals and Certiorari, 2.

See Attachment, 5.

See Executors and Administrators, 15.

See Exceptions, Bill of, 1.

See Forcible Entry and Detainer, 2, 9, 10.

See Garnishee, 1.

See Orphans' Court, 12.

See Pleadings, 6, 13.

See Statutes, 3, 4.

See Variance, 2.

ESTATE, LIMITATION OF.

1. Where a testator, after specially bequeathing slaves and other personal property to his daughters, declared his meaning to be, that they should "inherit the above bequest, and if no lawful heirs of their bodies, then to revert to the family or estate:" *Held*, that the limitation was wholly indefinite, reaching to the remotest descendants of the first takers, and being uncontrolled by any thing which preceded or followed it, the daughters took an absolute estate.—*Darden's Adm'r, et al.* v *Burns' Adm'r, and another*.....362

2. A testator, by will, directs that certain persons shall have full power and control over the property described in the will, "to be used and managed at their discretion, for the mutual use, benefit and interest of his daughter," (she then being a *feme covert*,) "and her surviving children: and as they come of age or marry, the property to be equally divided between her and them." This does not invest the wife with a separate estate; nor is the interest liable to subjection, by a suit in equity, for the payment of a promissory note executed by her together with her husband. Nor can the husband's interest in it be reached in a suit, where the allegations of the bill charge the estate to be one to the separate use of the wife.—*Inge, et al.* v. *Forrester*.....418

ESTOPPEL.

1. A sheriff who has collected money upon an execution, cannot dispute the right of the plaintiff to the money, upon the ground that the judgment was satisfied by a recovery and satisfaction in another case, founded upon the same cause of action.—*Hill, et als.* v. *Fitzpatrick, Gov. use, &c*.....314

EVIDENCE.

1. A former judgment is a bar only in reference to the subject matter of the suit, and the points there put in issue and determined. When, therefore, it is proposed to show, by the record of a judgment, that a certain matter was decided, it must appear from the record that such matter was in issue, and then parol evidence is admissible to show, that the matter, was, in fact, submitted to the jury. If the matter was not within the issue, such testimony is not admissible, as it would be, in effect, to contradict the record.—*Davidson & Stringfellow* v. *Shipman, et als.* 27

2. Upon the trial of the right of property, the issue being, that *the property levied on was, at the time of the levy, subject to the satisfaction of the execu-*

EVIDENCE—*continued.*

tion—it is not admissible to show, by parol, that the invalidity of the mortgage, under which the claimant deduced his title, was submitted to the jury.—*Ib.* 27

3. The indorser of a bill of exchange, being sued on his indorsement, pleaded that the bill was made to be negotiated to the plaintiff; that the consideration of the defendant's indorsement was the previous deposit, by the drawer, of ten bales of cotton in the ware-house at D; for which, at the time of the negotiation of the bill, he gave the plaintiff the receipt of, or order upon, the ware-house keeper. *Further,* that the cotton was of the value of one thousand dollars; that the plaintiff agreed with the defendant to take and sell the same, and apply the proceeds thereof to the discharge of the bill, before the defendant should be called on to discharge any part of it—All which the plaintiff has failed to do: *Held,* 1. It cannot be assumed, that the arrangement between the plaintiff and drawer, was not in writing. 2. That the plea would tolerate the admission of evidence to bar the action; though it might, perhaps, be competent for the plaintiff to show the removal or destruction of the cotton, so that it could not be obtained.—*Bank of the State of Alabama* v. *Whitlow*.....135

4. The protest of a notary public is admissible evidence, in an action on the bill of exchange to which it refers, although a witness may testify that he is acquainted with the notary's hand-writing, and does not believe the signature to the protest was written with his hand.—*Ib.* 135

5. A contract, for the sale of a horse, which is not reduced to writing, but for the price of the horse a note is given, is not affected by the rule that written contracts cannot be explained by parol evidence. In such a case it is competent to prove by parol that the note was to be returned if the horse died.—*Barlow* v. *Fleming*.....146

6. An action against a sheriff for failing to levy process, cannot be supported by proof that the money had been collected by him.—*Griffin* v. *Ganaway*.....148

7. If the purchaser refuse to comply with the terms of the sale, the sheriff may re-sell the land, and bring an action in his own name against the original purchaser, if the land sell for less than was bid at the first sale, for the breach of his contract...and will be liable for the amount so recovered in his official capacity, to those entitled to the proceeds.—*Robinson* v. *Garth*.....204

8. In an action brought by the sheriff, after a re-sale, the memorandum of the original sale made by himself, will not be competent evidence to establish the fact that such sale was made.—*Ib.*.....204

9. Where a witness (whose deposition was taken,) stated that he attended a negro, as a physician, whom the declaration alleged had been falsely warranted sound, upon a sale by the defendant to the plaintiff—*Held,* that the evidence of professional character was sufficient to authorise the admission of the evidence; and if this fact was controverted, the opposing proof should be addressed to the jury.—*Washington* v. *Cole*.....212

10. In an action for the recovery of land, purchased under a *fieri facias,* against the defendant in execution, it is not allowable for the latter to impeach the deed by showing an irregularity in the sale and proceeding preparatory thereto; and the purchaser's knowledge of the manner in which the levy and sale were made, will not authorize the application of a different rule.—*Hubbert, and another,* v. *McCollum.* 221

EVIDENCE—*continued.*

11. Land was levied on under an execution issued by a justice of the peace, and an order made by the Circuit court directing its sale; the costs, up to the time the papers were returned to court, were $3 81-100, and the entire costs are stated in the *venditioni exponas*, at $13 81-100. The order of court is, that the sheriff "be commanded to sell, &c.," and the terms of the *venditioni exponas* are, that he is "commanded to cause to be made of the lands, &c.:" Held, 1. That the inference is, that the costs were increased by the action of the Circuit court. 2. That the legal effect of the terms employed in the *order* and *venditioni exponas* is identical; consequently, there was no variance between them.—*Allen* v. *Best*.....234

12. When a bond is alleged to have been delivered as an *escrow*, and the evidence has no tendency to show that the condition of the delivery was communicated or known to the person to whom the delivery is made, the evidence may be rejected.—*Price, et al.* v. *Cloud*.....249

13. In such an action it is not necessary to produce the judgment on which the execution issued, its recital in the execution is *prima facie* evidence of the fact against the sheriff.—*Hill, et als.* v. *Fitzpatrick, Governor, use, &c*.....314

14. To let in secondary evidence of the contents of an execution, it is not necessary that a search should be made for it in the clerk's office, by the clerk; a search by any one who has access to the office will be sufficient, especially in a case where slight evidence of the loss of the paper would be sufficient.—*Ib*.....314

15. The recital in an execution that it has been issued on a judgment affirmed by the Supreme court, and that *ten per cent. damages* is to be made thereon, is evidence against the sheriff of the fact, without producing the record of the affirmed judgment.—*Ib*.....314

16. When evidence is offered, which is seemingly irrelevant to the matter in issue, it is the duty of the party offering it, to show how it can be made relevant by connecting it with other facts and circumstances already in evidence, or intended to be offered, and if there is no such offer to show its relevancy, the court may lawfully reject it.—*Crenshaw* v. *Davenport and Wife*.....390

17. An admission by the defendant, upon the presentation of an account to him that part of the account is correct, but without stating what part, and neither admitting nor denying the residue, cannot be construed into an admission that the entire account is just; and is of no value for the part admitted, from its uncertainty.—*Watson* v. *Byers*.....393

18. A bill of sale was made by C. (the defendant in execution,) to B., (one of the claimants,) to the negro woman in question, who was at that time concealed with three other slaves of C. in a county remote from that where the transaction took place, (whither he had removed them,) and was shortly thereafter delivered to B. at the place of her concealment. B. then returned in company with C's agent, and another person, to the county in which himself and his vendor resided—the other slaves, under the exclusive control of C's agent, accompanying them. The woman purchased by B. was levied on by *fi. fa.* against C's estate, and claimed by B. S. & Co. On the trial before the jury, the plaintiff in execution asked a witness, what disposition was made of the slaves that were brought back and not levied on, and where they were when he last saw

EVIDENCE—*continued.*

them; but upon the claimant's objecting to the question, the court adjudged the same to be inadmissible, and decided that it should not be answered: *Held*, that the question was *prima facie* irrelevant, and to have made a direct answer to it evidence, the plaintiffs should have stated the object of the inquiry, and how he intended to affect thereby the claimant's title to the slave in question.—*Tuggle* v, *Barclay, Stinnett & Co*.....407

19. When the plaintiffs claim title to land as the brother and descendants of a brother of the person last seized, it is not necessary to prove that the brothers were begotten in lawful wedlock: it is sufficient to show that they were the lawful brothers and legal heirs of the deceased.—*Bonner* v. *Greenlee's heirs*.....411

20. The admission of a party against whom secondary evidence of the contents of a written instrument is offered to be given, that the instrument is lost, will be sufficient to let in the inferior proof.—*Cooper* v. *Maddan*. 431

21. A party, to whom a chose in action is due by parol only, cannot be a witness against the defendant, although the suit is for the use of another, and all his interest in it is extinguished.—*Goodwin, use of Hale, &c.* v. *Harrison*.....438

22. When suit is brought on a promissory note, in the name of the payee, for the use of another, and is produced in evidence at the trial, it ought not to be excluded, although it appears, from an endorsement upon it, to have been assigned to one not connected with the suit; the legal presumption in such a case is that the note has been returned by the assignee to his assignor.—*Herndon, use of Woodward*, v. *Taylor*.....461

23. Evidence is admissible to show when in fact an execution issued, either by proving that the clerk made a mistake in the *teste* of the writ, or that it has subsequently been altered.—*Harrell* v. *Martin, Pleasants & Co.* 587

24. Where the question is, whether slaves were sold absolutely, or delivered as a pledge upon a promise that when the sum intended to be secured was paid, the person receiving them would settle them upon the debtor's wife, the difference between the debt and the value of the slaves, the failure to deny the right to redeem when the debt was tendered, and the declaration of the creditor made contemporaneously with the reception of the slaves, that he had bought them for the wife, are strong circumstances to show that they were not purchased unconditionally.—*Sledge's adm'rs, et al.* v. *Clopton*. 589

25. The loss of a private paper is sufficiently shown so as to admit secondary evidence of its contents, by proof that it could not be found where it was last seen, or amongst the papers of those persons to whom it would most probably be intrusted.—*Ib.* 589

26. The rescission of a contract, under seal, cannot be given in evidence under the plea of accord and satisfaction, nor can the acceptance of rent from another as tenant, avoid a lease, unless the fact be pleaded specially.—*Barelli & Martin* v. *O'Conner*. 617

27. The defendant was arrested on a bail writ at the suit of W. and escaped from the custody of the Sheriff; afterwards W. sued out an ancillary attachment, which was levied on the same property that had been previously seized under an original attachment issued at the suit of the plaintiff against the defendant: *Held*, that the liability of the Sheriff to W. for the escape, did not

EVIDENCE—*continued.*

disqualify him as a witness at the instance of the defendant, on the trial of the cause commenced by attachment, by the plaintiff; that the objection to the witness went only to his credit....*Massey* v. *Rogan*.....647

28. Heirs or distributees are not competent witnesses for the executor or administrator to establish a claim in favor of the estate, although they execute releases of all their interest in the demand in suit.—*Williams' ex'rs* v. *Temple, adm'r*. 656

29. A witness cannot be excluded by proving his confessions of an interest in the suit.—*Bates* v. *Ryland*.....668

30. In an action against the sheriff, for levying an execution on property which belonged to a third person, C. was offered as a witness for the defendant, who stated that he was a stockholder in a banking company; that N. it was proved, was the *reputed* agent of the company, and had given an indemnifying bond to save the sheriff harmless for levying on and selling the property in question: *Held*, that the proof of N.'s agency was insufficient as applied to the present case, and that C. was a competent witness for the defendant.—*Kirk et al* v. *Suttle*. 679

31. In a prosecution by the State against a husband for an assault and battery on his wife, the wife is a competent witness for the husband to disprove the charge. —*The* v. *State Neill*.....685

32. Upon a suit on a note payable *on demand*, at a particular place. it is not necessary that the plaintiff should prove a demand at the place before suit brought. It is matter of defence for the defendant, if he was ready at the place, to pay.—*Montgomery* v. *Elliatt, use*, &c. 701

33. Although the copy of a record is evidence, yet if the original is produced it is alse admissible, and may be used instead of a copy.....*Curwile* v. *House*. 710

34. A co-maker of a promissory note is a competent witness to prove a presentment of the note to the executor of a joint maker of the note....*Cawthorne* v. *Weisinger*.....714

35. In an action for wrongfully and maliciously suing out an attachment against the plaintiff's estate, it is not allowable for him to prove, that *by common reputation in the neighborhood in which the defendant and himself resided*, it was supposed that he had gone to an adjacent State on a visit of business or pleasure....*Pitts* v. *Borroughs*. 733

36. What a party said upon leaving home, or immediately previous thereto, is *admissible* evidence in his favor as a part of the *res gestæ*, on the trial of an action for wrongfully and maliciously suing out an attachment against him in his absence.....*Ib*. 733

37. The opinion of one of the commissioners appointed by an act of incorporation to receive subscriptions for stock, that a subscriber might forfeit his stock by failing to pay an assessment thereon, can have no influence upon the liability of the latter; and in an action brought for the recovery of an assessment, is irrelevant testimony.—*Hall* v. *Selma and Tennessee Railroad Company*.....741

38. The act of 1819, makes the "borrower or party" to a usurious contract, a competent witness to prove the usury; but this statute cannot be so construed, as to authorise the indorser or surety of the "borrower or party," when sued, to be a witness to prove the fact, so as to defeat a recovery against him.—*Paul* v. *Meek*.....753

39. "The borrower or party" being competent to prove the transaction illegal for

EVIDENCE—*continued.*

usury, the *particular facts* to which he may testify, cannot be defined with precision, but must depend, to a great extent, upon the case itself. ..*Ib* 753

40. The statute, allowing the plaintiff's oath as evidence in all suits on accounts for sums not exceeding one hundred dollars, applies to a demand for fifty dollars due on a horse swap.—*Cave, use of Wallace*, v. *Burns.* 780

41. A judgment on a note executed by the defendent and the plaintiff, as the joint sureties of a third person, is proper evidence under a plea of set-off, as laying the foundation to prove the payment of money at the plaintiff's instance.—*Ib.* 780

42. When the record does not disclose the fact, parol evidence is admissible to show that a judgment against the defendant is founded on a note to which he and the plaintiff were sureties for another, the plea being set-off, and the attempt made to show money paid at the plaintiff's instance.—*Ib* 780

43. When the plaintiff and defendant are the only witnesses in an action upon an account for a sum not exceeding one hundred dollars, under the statute of 1839, the denial by the defendant, on oath, of the facts sworn to by the plaintiff, deprives the testimony of the latter of all force whatever.—*Anderson* v. *Collins.* 783

44. P. exchanged two female slaves with R. for a negro man, and gave him a receipt acknowledging to have received from him $850 for the two slaves, which he warranted to be sound. Afterwards, R. insisting that one of the slaves was unsound, offered to rescind the contract, which P agreed to if R. would receive back the negro man, which he refused, and demanded the $850. R. having brought an action against P. on the warranty,—*Held* 1. That the receipt was open to explanation by parol proof showing what the contract really was. 2. That P. had the right to return the slave he had received, when the rescission was demanded, and that upon his failure to do so, the measure of damages would be the value of the slave at the time he received him, unless at the time of the exchange the parties estimated his value. 3. It was not necessary to a rescision that the plaintiff should offer to return the bill of sale.—*Pettus* v. *Roberts.* 811

45. The admission of one person that another was his partner, is not evidence to establish the existence of a partnership, and the fact that the party making the admission is not sued in the same action, or is dead, can have no influence upon the admissibility of the evidence: the representative of a deceased partner are made liable at law, if the survivors are insolvent.—*Thornton* v. *Kerr & Hope.* 823

46. A recovery in an action against the sheriff for a false return, is no evidence to fix the liability of his sureties, when they are sued upon his official bond —*Lucas* v. *The Governor, for the use of Harper*.....826

47. A bond executed by the name of Jas. W. will be admitted under a declaration which states the obligor's name to be James W.; the latter will be intended to be the true name, and the former a mere contraction of it....*Robbins, et al.* v. *The Governor of Alabama, use of, &c.* 839

48. The reading to the jury of an affidavit of the loss of an instrument, and *its contents*, will not prejudice the party on error, though irregular, if the witness gave oral testimony also to the jury, of the contents of the paper.—*Patterson & Hinson* v. *Burnett, adm'r.* 844

49. Whether an entry upon an execution docket be evidence or not, *per se*, the testimony of the clerk or his deputy, that it was genuine, and that he had no

EVIDENCE—*continued.*

doubt but it correctly stated the day when an execution was returned, made it admissible.—*Hartley, use, &c.* v. *Chandler, et al.* 857

50. One joint maker of a promissory note cannot be called as a witness for the other with whom he is sued, although he makes no defence to the suit; for a verdict in favor of his co-defendant, would operate a discontinuance of the action, and even vacate the judgment if one had been rendered against him.... *Turner, et al.* v. *Lazarus.* 875

51. Evidence of what was said in certain conversations between a defendant in execution and one who afterwards, during the same day, purchased a slave sold by the sheriff, is admissible, when the object is to show that the purchase was made on account of the defendant....*Downman* v. *Frow & Ferguson.* 879

52. An account filed against an insolvent estate, is not, under the statute, previous to the passage of the act of 1843, sufficiently proved, by an affidavit of its correctness, made at the time it is filed, but if objected to, it must be proved according to the course of the common law.—*Askew* v. *Weissinger, ex'r.* 907

53. When copies of a libel are offered in evidence, instead of the original, which are stated in the record to be *substantial* copies of the original, if the copies are not set out in the record, this court will presume, after verdict, that the variance between the copies and the original, was immaterial ...*Weir v. Hoss and Wife.* 882

See Entry, 4.

See Pleadings, 8.

EXCEPTIONS, BILL OF.

1. The bill of exceptions is prepared by the party excepting, and need only state so much of the case as is necessary to show error; therefore, when error is shown, a reversal will not be withheld, because in another aspect of the case, the error complained of would be immaterial....*Seawell* v. *Henry*.....226

2. Where it appears from a bill of exceptions that the plaintiff failed to make out his case, an appellate court will not, at his instance, reverse a judgment rendered against him, because the court expressed to the jury an incorrect opinion upon the law, or gave an erroneous reason for a correct conclusion.... *Shepherd, et al. Nabers*.....631

3. A scroll around the word seal, opposite to the signature of the judge who signs the bill of exceptions, is a sufficient seal....*Kenan* v. *Starke and Moore*.....773

4. A bill of exceptions must always be taken most strongly against the party excepting; and where it states facts which show that a person had a considerable length of time, previously become the purchaser of land, and his right to occupy it was during all that time undisputed, it will be intended against the party excepting and in favor of his adversary, that the purchaser was in possession....*Mallory* v. *Stodder*.....801

5. A bill of exceptions may be suppressed, when it is shown that it was fraudulently or surreptitiously obtained; but the Supreme Court cannot try the facts and determine what was the point reserved at the trial, nor can any admission made by the judge afterwards, affect the validity of the bill...*Weir* v. *Hoss and Wife*.....881

EXECUTION, WRIT OF.

1. If an execution be issued in the life-time of the defendant the *lien* may be con-

EXECUTION, WRIT OF—*continued.*

tinued after his death by an *alias* or *pluries*. But if there be a chasm by the lapse of a term, an *alias* cannot issue, but the judgment must be revived by *scire facias* against the personal representative.---*Boyd, Adm'r*, v. *Dennis*.....55

2. The section of the act of 1807, "concerning executions, &c.," which inhibits the removal of goods and chattels, levied on by execution, from any messuage, lands, &c., leased, &c., until the payment of the money due for rent of the premises, only gives a lien for the rent due at the time of the levy, and not for what is then accruing, and to become due at some future period.—*Whidden* v. *Toulmin*.....104

3. Where the sheriff levies process on goods of a tenant in a house leased to him, he is not liable to the landlord for its use and occupation, if the possession has not been demanded, and he merely retains the key, using the house for the safe-keeping of the goods...the lease continuing during all the time of the sheriff's occupancy.—*Ib*.....104

4. A bond of indemnity, given by the defendants to an execution, to the sheriff, to save him harmless against the consequences of levying on and selling the property of a stranger to the judgment, for its satisfaction, is illegal, and void, and no action can be mantained by the sheriff upon it.—*Prewitt* v. *Garrett*.....128

5. If the purchaser refuse to comply with the terms of the sale, the sheriff may re-sell the land, and bring an action in his own name against the original purchaser, if the land sell for less than was bid at the first sale, for the breach of his contract---and will be liable for the amount so recovered in his official capacity, to those entitled to the proceeds.—*Robinson* v. *Garth*.....204

6. In an action for the recovery of land, purchased under a *fieri facias*, against the defendant in execution, it is not allowable for the latter to impeach the deed by showing an irregularity in the sale and proceeding preparatory thereto; and the purchaser's knowledge of the manner in which the levy and sale were made, will not authorise the application of a different rule.---*Hubbert and another*, v. *McCollum*.....221

7. The irregular execution of a *fieri facias* may be corrected, or avoided by a seasonable application to the court from which it issued.--*Ib*.....221

8. Land was levied on under an execution issued by a justice of the peace, and an order made by the Circuit court directing its sale; the costs, up to the time the papers were returned to court, were $3 81-100, and the entire costs are stated in the *venditioni exponas*, at $13 81-100. The order of court is, that the sheriff "be commanded to sell, &c.," and the terms of the *venditioni exponas* are, that he is "commanded to cause to be made of the lands, &c.:" Held, 1. That the inference is, that the costs were increased by the action of the Circuit court. 2. That the legal effect of the terms employed in the *order* and *venditioni exponas* is identical; consequently, there was no variance between them.—*Allen* v. *Best*.....234

9. *Quere?* will a purchaser at a sheriff's sale be affected by a variance between the *venditioni exponas*, and the order under which it issued, if the writ is not void. *Ib*.....234

10. The return of satisfaction upon an execution, without any date or evidence in connexion with it, refers to the return day of the execution.---*Price, et al.* v. *Cloud*.....249

EXECUTIOT, WRIT OF—*continued.*

11. An *alias pluries fi. fa.* is sufficiently described as an "execution."—*Hill, et als.* v. *Fitzpatrick, Gov. use, &c*.....314
12. Evidence is admissible to show when in fact an execution issued, either by proving that the clerk made a mistake in the *teste* of the writ, or that it has subsequently been altered.—*Harrell* v. *Martin, Pleasants & Co.* 587
13. A writ of *fieri facias* does not become a record of the court until it has been returned by the sheriff. --*Ib*..... 587
14. Where a sheriff justifies the seizure of property under a writ of *fieri facias*, he need not allege that a judgment was rendered in the case in which the execution issued; the production of the judgment may become necessary, where the plaintiff proves that his title is paramount to the lien of the execution.---*Shepherd, et al.* v. *Nabors*.....631
15. Where a defendant, against whose estate a writ of *fieri facias* is sued out, dies after the same has been injoined, his lands are not subject to levy and sale under an execution issued after his death, upon the dissolution of the injunction. The act of 1835 "to authorise the issuing of executions in certain cases, and for other purposes," does not apply to such a case.---*Abercrombie* v. *Hall* 657
16. A surety, after paying the amount of the execution issued against the principal and other sureties, as well as himself, is not entitled to have the execution kept alive for his own benefit, either against the principal or co sureties. *Morrison, Givhan, et al.* v. *Marvin*.....797

See Frauds, Statute of, 2, 3.

EXECUTORS AND ADMINISTRATORS.

1. An administrator, *de bonis non*, cannot cause his predecessor and sureties to be sued upon the administration bond executed by them, where no judgment or decree has been obtained against the principal therein, for the breach of his duty as administrator.---*Judge of Benton County Court, use, &c* v. *Price, et al* 36
2. The administrator of an intestate, against whom a judgment has been recovered, when living, is the proper party to sue out a writ of error, and may do so on application to the clerk. If he supersedes the judgment, it may be affirmed with damages, as in other cases.-- *Headon* v. *Turner, Adm'r*.....66
3. Where an administrator makes a warranty of the soundness of personal property belonging to his intestate's estate, which he sells under an order of court, he is chargeable for a breach in his representative character.---*Craddock* v. *Stewart's Adm'r*.....77
4. A citation to an administratrix, which calls her "to make a showing of how and in what manner she has administered and disposed of the estate of the deceased, will not authorize the judge of the county court, on her failing to appear, to make a final settlement of the estate--*Blackwell, Ad'x* v. *Vastbinder* 218
5. The assets which come to the hands of an administrator, pass to his successor if he die, resigns, or is removed before he administers them.-- *King and Clarke* v. *Griffin, use, &c*.....387
6. The purchaser of property at an administrator's sale, when he has received the property, cannot, in an action for the purchase money, require the plaintiff to prove the regularity of the sale, and is estopped from showing its illegality, so long as he retains the property purchased.---*Harbin* v. *Levi*.....399

EXECUTORS AND ADMINISTRATORS—*continued.*

7. When an administrater has sold property of his intestate, and has not received the price, if he is afterwards removed from the administration, he can maintain no action against the purchaser. The right of action is gone with the administration, and passes to the new administrator.--*Ib*.....399
8. A promise by an administratrix, to pay a debt due by her intestate, is not binding on her individually, although it be in writing, there being no new consideration for the promise.—*Hester* v. *Wesson*.....415
9. The bond required to be executed upon the prosecution of an appeal from a judgment rendered by a justice of the peace, is, only a means provided by statute for the continuance of the litigation in the appellate court, and does not impose upon the sureties an obligation other and greater than that to which the appellant is liable: consequently, where one sued as administratrix, appeals, she may plead that the estate she represents has been declared and adjudged insolvent, and if her plea is sustained, no judgment can be rendered against her sureties on the appeal bond.---*Lunsford, use, &c* v. *Baskins' Adm'x*, 512
10. The defendant, an administratrix, pleaded, that the estate of her intestate was declared and adjudged insolvent, the jury found the plea to be true, assessed the plaintiff's damages, and judgment was rendered that the suit abate and be referred to the orphans' court: *Held*, that although the act of 1843 required, that the judgment in such case should be that the plaintiff is entitled to the sum found due him, but no execution shall issue and the judgment be certified the proper orphans' court, yet the defect was a mere clerical misprison, amendable at the costs of the plaintiff in error.—*Ib*.....512
11. In an action against an administrator, it is not allowable to declare in one count upon a demand for which he is liable individually, and in another for a debt due the estate he represents; such a declaration would be objectionable on general demurrer for a misjoinder of counts.---*Jefford's Adm'r* v. *Ringgold & Co*.....544
12. An executor or administrator may ratify the contract of his intestate made during his infancy, although the intestate died before he attained his majority; and such ratification will be obligatory, though it was verbally made, without any new consideration.---*Ib*.....544
13. An executor, by appearing and submitting to account, waives all objection to the citation.---*The Executors of Sankey* v. *The Heirs of Sankey*.....607
14. The decree, in such a case, must be in favor of the administrator, and it would be error in the court to make distribution thereof among the distributees of the deceased wife. Such distribution could only be made in a proceeding between the distributees and the administrator.---*Ib*.....607
15. The act which requires notice to be published, &c. when an executor's account will be reported for allowance by the judge of the orphans' court, is for the benefit of creditors, &c., and an executor cannot object on error that publication was not regularly made.---*Davis* v. *Davis, et al*.....611
16. The time within which claims can be presented to an executor or administrator, is computed from the date of the grant of letters testamentary, and not from the date of the executor's advertisement.---*Cawthorne* v. *Weisinger*. 714
17. A presentment must be made within eighteen months, though the estate is declared insolvent.---*Ib*.....714
18. An objection to the revival of a suit in the name of an administrator, can not

EXECUTORS AND ADMINISTRATORS—*continued.*

be made in this court, if not raised in the court below....*Patterson and Hinson* v. *Burnett, Adm'r*.....844

19. A report by the administrator, that the estate represented by him is insolvent, is necessary to give the county court jurisdiction to decree against him in favor of creditors: and a report of insolvency made by a previous administrator, has no effect on a subsequent administrator, *de bonis non*....*Lambeth and Wife* v. *Garber, et al*.....870

20. An executor or administrator having an interest in the estate may purchase at his own sale, provided it is fairly conducted; if not, it may be set aside by creditors or legatees, but is not a nullity.—*McLane* v. *Spence. Adm'r*.....894

21. Where one as the executor or administrator of two estates, becomes possessed of the property of both, as he cannot sue himself, he will be presumed to retain what is due from one, to the other, whether it be a debt or unliquidated damages.—*Ib*.....804

22. S being administrator of the estates of K and C, elected to consider certain slaves, which C, being the former representative of the estate of K, had purchased at his own sale, as the property of the estate of K, by hiring them out, as such, and in various other modes. The slaves having been sold under execution against the estate of K, S brought an action against the officer for a trespass upon the estate of C: *Held*, that as he had elected to consider the slaves as the property of the estate of K, he could not afterwards insist they were the property of C, as he had merely done what a court of chancery would have directed, if application had been made to it to set aside the purchase made by C.—*Ib*.....894

23. An account filed against an insolvent estate, is not, under the statute, previous to the passage of the act of 1843, sufficiently proved, by an affidavit of its correctness, made at the time it is filed, but if objected to, it must be proved according to the course of the common law.—*Askew* v. *Weisinger Ex'r* 907

See Assumpsit, Action of, 4.

See Husband and Wife 5.

See Orphan's Court, 6.

See Wills and Probate, 7.

FEME COVERT.

1. *Semble*, that where personal property is given to the *sole and separate* use of a *feme covert*, she may, as incident to such an interest, dispose of it by will; and although she be entitled only to the profits derivable from the enjoyment of the property, she may, under an authority from her donor, declare who shall enjoy it after her death.—*Lewis, et al. by their next friend*, v. *Hudson and another*.....463

2. Where a *feme* is sued on a promissory note made by her when covert, and she pleads her coverture in bar, it is not a good replication that she promised to pay the note after her husband's death, unless some new consideration or previous moral obligation is shown to support the promise....*Vance* v. *Wells & Co*,.....737

FORCIBLE ENTRY AND DETAINER, &C.

1. When the complaint in a suit of forcible entry and detainer bears a date

FORCIBLE ENTRY AND DETAINER.

nearly two years subsequent to the time of the trial, it will be considered as a clerical error, and therefore unavailable.—*Powers* v. *David*.....9

2. It is not a material error, that the record, in a suit of forcible entry and detainer, does not shew whether an issue was formed by the parties, or the plea of not guilty entered by the court.—*Ib*.....9

3. If there is a general verdict that the defendant is guilty of an unlawful detainer, and the judgment is "according to the verdict," both will be referred to the complaint, which, if sufficient in the description of the lands, and of the offence, will sustain the judgment —*Ib*.....9

4. In an action of forcible entry and detainer, the complaint described the land as "a part of the township 14, range 1 west, and section 9, S. W. qr. of 80"—*Held*, that the concluding part "of 80" might be rejected as surplusage, and that the true construction was, that the land described in the complaint was a part of the S. W. quarter of section 9, in township 14, range 1 west, and that this description, unaided by any thing in the verdict and judgment, rendering it more certain, was insufficient.—*McRae* v. *Tilman, and others*.....486

5. The allegation in the complaint that the complainant had lawful and peaceable possession of the lands for five years, is an allegation of such an estate as will suppor the action.—*Ib*.....486

6. The recital in the record that the jury were duly sworn well and truly to enquire of said forcible and unlawful detainer, is sufficient, without stating that they were sworn to try the cause according to the evidence.—*Ib*.....487

7. When the judgment of the justice is reversed by the circuit court, because the lands are not sufficiently described in the complaint, the cause should be remanded for the purpose of amendment.—*Ib*.....487

8. No objection will be allowed in an appellate court to the complaint in a proceeding for an unlawful detainer, which was not made before the justice of the peace, if it is not so defective in substance that no judgment can be rendered for any particular premises.---*Hilliard, by next friend*, v. *Carr & Ketchum* 557

9 Where the notice to relinquish the possession previous to exhibiting the complaint for an unlawful detainer, was given by the attorney at law of an infant in the absence of any thing appearing to the contrary, it will be intended on error, that he was employed by the guardian or next friend of the infant.---*Ib* 557

10. The act of 1840 "To provide a more perfect remedy in cases of unlawful detainer in the city of Mobile," provides, that if the judgment of the justice of the peace in such case be reversed, by the circuit court, there shall be a trial *de novo* by jury in that court, &c.: *Held*, that on an appeal or writ of error to the supreme court, it will be allowable to assign errors in the record, arising previous to the judgment of reversal.---*Ib*.....557

FRAUD, AND FRAUDULENT CONVEYANCES.

1. Where a mother, in contemplation of a second marriage, with the assent of her intended husband, makes a settlement upon her infant daughter, the settlement is not void as against the husband, or his creditors, merely because the deed by which the property is thus conveyed, disposes of a *contingent remainder* therein to a third person, without the approbation of the husband.—*Thomas and Howard, trustees, &c.* v. *Davis*.....113

2. T. executed a mortgage to D., on the 28th April, 1840, by which to secure the

FRAUD, AND FRAUDULENT CONVEYANCES—*continued.*

payment of certain debts, (the amount or description of which are not stated,) he conveyed real estate, slaves, house-hold furniture, and "a stock of groceries, chandlery, goods, wares and merchandize," reserving the right to "retain in his possession, and use the goods, wares, merchandize, &c. and to sell and dispose of the same" to satisfy the mortgage debt, and if the said debt was not paid on or before the 1st December, 1841, then the mortgagee was authorised to sell and dispose of the mortgaged property, giving thirty days notice, &c. T. retained the possession of the mortgaged property for more than a year after the 1st of December, 1841, sold in his own name, the stock of goods, and with the proceeds, frequently replaced it—sold the slaves, and some other personal property, and invested the proceeds in trade—paid the mortgagee from the sales of the store, more than ten thousand dollars, but without diminishing the mortgaged debt, it being re-invested in goods and merchandize: *Held*, 1. That it was a suspicious circumstance that no schedule or inventory of the property conveyed, or the debt to be secured, accompanied the deed, although this of itself would not be evidence of fraud, it would, unless the omission was explained, add weight to any other objection that might exist to the deed. 2. That the retention of possession, by the mortgagor, after the law day had passed, was a badge of fraud. 3. That this inference of fraud, from the possession, so far from being repelled, was confirmed by the facts admitted; that the mortgagee permitted the mortgagor to retain and use the property as his own, by selling it in his own name, and by re-investing the proceeds in other articles of merchandize, to be again sold, and the proceeds again re-invested—that whatever might have been the intention of the parties, these acts were, in law, evidence that the deed was made with the intention to delay, hinder, and defraud creditors, and therefore, as against them, void.—*Wiswall* v. *Ticknor and Day.* 178

3. Whether a mortgage of articles of merchandize, which the mortgagor has the right to *use*, sell and dispose of, for the purpose of paying the mortgage debt, is not fraudulent *per se*—*Quere.*—*Ib* 179

4. Where a deed conveys slaves to one, who by his own note has become liable for the benefit of the grantor in the deed, and the note is held past due by a bank, a stipulation, that the grantee may sell the slaves, to answer any default by the grantor, from time to time, to meet the payments required by the bank, of the grantee, is to be construed as an agreement that the slaves shall remain in the possession of the grantor until such default: and the fact that they so remain, is no badge of fraud.—*Desha, Sheppard & Co.* v. *Scales.* 356

5. Where one person receives a conveyance of property, upon a verbal stipulation that he will dispose of it absolutely or conditionally for the benefit of another, he will be compelled to perform his engagement.—*Sledge's adm'rs. et al.* v. *Clopton.* 589

6. A party who has received property under an agreement to transfer it to a third person, cannot object to perform his contract because the party delivering it to him was indebted either to himself or others.—*Ib.* 589

See Chancery, 21.

See Gift, 5, 6.

FRAUD, AND FRAUDULENT CONVEYANCES—*continued.*

See Parent and Child, 4.
See Vendor and Vendees, 2.

FRAUDS, STATUTE OF.

1. The second section of the statute of frauds, which declares, that a loan of personal property, accompanied with the uninterrupted possession for the space of three years, shall be fraudulent as to the creditors and purchasers of the loanee, does not apply to a case where a step-father takes and retains possession of property settled upon trustees for the use of an infant daughter, by her mother, without the trustees assent, and the latter filed their bill for its recovery within the three years, which is still in a course of prosecution.—*Thomas and Howard, trustees, &c.* v. *Davis.* 113
2. Sales of land by sheriffs, under execution, are within the statute of frauds.—*Robinson* v. *Garth.* 204
3. The sheriff is the agent of the purchaser, and may sign his name to a memorandum of the particulars of the sale, so as to satisfy the requisition of the statute of frauds—and a statement in writing, made by the sheriff at the time of the sale, describing the land sold by its designation at the land office—the price at which it sold—and the name of the purchaser, is a sufficient memorandum or note in writing, within the statute of frauds.—*Ib.* 204
4. Upon a verbal contract for the sale of land, the vendor cannot maintain an action at law for the purchase money, although the vendee has paid a part of the price, and retains the possession of the land.—*Johnson* v. *Hanson.* 351
5. When slaves, belonging to a mother, are permitted by her to remain in the possession of a son, he recognizing her title, for more than three years, and he dies in possession, but insolvent; his administratrix cannot recover the slaves in detinue from the mother, who subsequent to the grant of administration on her son's estate, has regained the possession; the administratrix does not represent the creditors who might, under the statute of frauds, be entitled to have satisfaction of their debts out of the slaves.—*Marler, adm'x,* v. *Marler.* 367
6. When upon a sale of land by parol, a considerable part of the purchase money is paid, and the vendee let into possession, who makes improvements, a court of chancery will decree a specific performance, at the suit of the vendee against a creditor of the vendor, upon the payment of the residue of the purchase money.—*Cummings' heirs, et al.* v. *Gill's heirs.* 562
7. Where one acquires the possession of slaves under a contract with the owner to pay an equivalent for their services, and restore them to him at the end of the year, a renewal of this contract from year to year, thus continuing the possession of the hirer, without interruption for more than three consecutive years, is not a loan, &c., within the second section of the statute of frauds, so as to subject the slaves to his debts.—*Bank of the State of Alabama* v. *Croft.* 622
8. A promise, not in writing, to pay the debt of another, is within the statute of frauds, unless it be made upon some new consideration *beneficial* to the promisee.—*Brown* v. *Barnes.* 694
9. A promise by one, that he will pay the debt of another, if the creditor will

FRAUDS, STATUTE OF—*continued.*

state the account, and make affidavit of its correctness, before the Mayor of the city of Philadelphia, is void under the statute of frauds, unless it be in writing.—*Ib* 694

See Contract, 10.

FREEHOLD, AND FREEHOLDERS.

1. The right of a freeholder to be sued in the county of his residence, is a personal privilege, and cannot be pleaded by any other party to the suit; therefore, a joint plea by two defendants, one of whom is liable to the suit, is bad.—*Weaver & Gains* v. *Crenshaw*. 873
2. Whether an estate in dower would entitle the second husband to an exemption from suit, out of the county of his residence, *Quere?*—*Ib*. 873

GARNISHMENT AND GARNISHEE.

1. When the judgment entry shews a sufficient admission to charge the garnishee, his answer, although in writing, and sent up with the transcript, can not be looked into to impeach the judgment, unless it is referred to in the entry, or made a part of the record, by some specific exception.—*Saunders* v. *Camp*. 73
2. Proceedings by way of garnishment, against a debtor of the defendant in execution, are irregular, if commenced by a notice from the sheriff, without being supported by the affidavit required by statute. It is not the sheriff's duty to proceed thus, and if the garnishment have no other support, a judgment by default upon it is erroneous.—*Clark* v. *Gaither*. 139
3. A sum of money produced by the sale of the effects of a defendant in execution, remaining in the hands of a constable, after satisfying executions against the defendant, is subject to be attached; and it is no defence to the garnishee process that the defendant in execution has commenced proceedings against the constable for the recovery of the surplus so remaining with him.—*King* v. *Moore*.....160
4. A garnishee who acknowledges the service of a garnishment regularly issued, and answers the same, cannot object on error that the process was not executed by the sheriff, or proper officer.—*Daniel. et al. &c.* v. *Hopper*.....296
5. The defendants being sued on a specialty, for the payment of four hundred dollars, pleaded in bar that they had been summoned as garnishees, at the suit of L. S. F., who had recovered several judgments against the plaintiff, before a justice of the peace, to state how much they were indebted to the latter; that they admitted they owed him two hundred dollars on the specialty, and no more, and their answer was contested before the justice, who after hearing the evidence, adjudged that the same was true. Several judgments were rendered by the justice against them as garnishees, amounting to the sum admitted to be due—all of which have been satisfied: *Held*, that the sum of two hundred dollars, the sum then in controversy, being beyond the jurisdiction of the justice of the peace, the inquiry as to the defendants' indebtedness, and the decision thereon, did not sustain a plea of "Former recovery," or in any manner affect the plaintiff's rights.—*Cameron* v. *Stollenwerck, and another*. 704
6. When a debt due by promissory note is attached by garnishee process, the service creates a lien upon the debt, which cannot be defeated by a subsequent

GARNISHMENT AND GARNISHEE—*continued.*

bona fide transfer by the payee of the note to a third person, notwithstanding the entire ignorance of the assignee of the process or its service.—*Dore* v. *Dawson.* 712

7. The register of a court of chancery is subject to garnishee process, with respect to a surplus remaining in his hands belonging to the defendant in chancery, after sale of property to satisfy a mortgage decree, although the sale has not been confirmed, and although he is required by the decree to report his doings at the next term of the chancery court.—*Langdon* v. *Lockett.* 727

8. A justice of the peace having collected money, is subject to garnishee process, and the service of such upon him is a sufficient excuse for the omission to pay over the money to the person for whom it was collected, and is consequently a bar to the damages allowed by statute.—*Clark* v. *Bogg, use, &c.* 809

9. It is discretionary with a court to permit a garnishee to amend his answer, and that even after an issue has been tried between the plaintiff and one to whom the debt attached is supposed to be transferred.—*Buford* v. *Welborn.* 818

10. The answer of a garnishee admits the receipt of a sum of money from the debtor, to be accounted for to him by the garnishee on a final settlement, but insists that since the service of garnishee process, he has been compelled to pay larger sums for the debtor, so that on a final settlement, nothing will be due; this is not such an admission of indebtedness as will authorise a judgment against the garnishee. If the right to set off debts paid subsequently to the service, could be defeated, it was the plaintiff's duty to have drawn out the facts by interrogatories, or by forming an issue to try the question of indebtedness. —*Ib.* 818

11. The design of the act of the 5th February, 1840, which requires a summons to issue to the assignee or transferee of a debt when the garnishee has disclosed by his answer that such is the fact, was to enable the plaintiff in attachment to contest the validity of the alleged transfer. In such a case the proper course is for the plaintiff to alledge the invalidity of the transfer to which the assignee would be required to answer, and thus an issue would be made, to be tried either by the court or jury, as might be proper.—*Goodwin* v *Brooks, et al.* 836

12. When the record does not disclose that upon the appearance of the assignee the plaintiff made an allegation against him, an order discharging the assignee will be upheld, as it must be presumed that the plaintiff abandoned the pursuit of the garnishment.—*Ib.* 836

13. When a trustee, appointed under a deed of trust for the benefit of creditors, has placed the choses in action, assigned to him, in the hands of an attorney for collection, and the latter is garnisheed by a creditor of the grantor in the trust deed, no judgment can be rendered against him until the trustee has been brought before the court, and the trust deed declared invalid in a contest between him and the attaching creditor.—*Covington & Reavis* v. *Kelly, use of, &c.* 860

See Attachment, 2.

GIFT.

1. Where a mother, in contemplation of a second marriage, with the assent of her intended husband, makes a settlement upon her infant daughter, the settlement is not void as against the husband, or his creditors, merely because the deed by which the property is thus conveyed, disposes of a *contingent remainder* therein to a third person, without the approbation of the husband.—*Thomas and Howard, trustees, &c.* v. *Davis*.....113

GIFT—*continued.*

2. Where a father, upon the marriage of his daughter, or afterwards, sends home a slave with her, which remains in the husband's possession for ten years, the presumption that it was a gift, must be explained or rebutted by satisfactory proof that it was notoriously understood not to be a gift at the time: and even if there is such proof, it is not too much to say that a strong presumption arises, which will warrant the inference of a subsequent absolute gift, when the contest is between a creditor and the donor.—*Hill & Dill* v. *Duke*. 259
3. A father, by deed, conveyed certain slaves to his son, stipulating at the time, by parol, for the possession of the slaves during his life, and retained the possession about sixteen years, when the son obtained the possession of one of them without the father's consent. The father having brought an action to recover the slave—*Held*, 1st. That as between him and his son, no length of time would ripen his possession into a title, unless it was held by him adverse to the title of his son. 2d. That to show the character of the possession, it was competent for the son to prove the parol agreement relating to it.—*Strong* v. *Strong*. 345
4. Where a father made a contract with his son, *then living with him*, that he would give him a slave for doing certain work upon a mill, which was done, and the slave conveyed to the son—*held*, that the slave could be taken in execution at the suit of the creditors of the father.—*Godfrey* v. *Hays*. 501
5 A gift of slaves by a father to a son is void as against existing creditors.—*Moore* v. *Spence*. 506
6. The right of a creditor in such a case, is not varied by the fact that a new note was executed for the debt subsequent to the gift.—*Ib*. 506

See Estate, Limitation of, 2.

See Feme Covert, 1.

See Will, 6.

See Will, and Probate of, 8.

GUARANTY, ACTION ON, &C.

1. A guaranty in these words, "I bind myself to pay this note if T. M. L. (the maker) does not," made upon the back of the bill by one who is not a party to it, is not within the statute defining the liability of indorsers; and the diligence required of the holder is to sue the maker to the first court subsequent to the guaranty: but this is unnecessary when the maker is unable to pay by reason of insolvency, and in such event an action on the guaranty will lie without any suit against the maker.—*Nesbit* v. *Bradford*. 746
2. The *prima facie* intendment of such a guaranty, considered in connexion with the single bill is, that the contract was made with the payee.—*Ib*. 746
3. Such a guaranty is a promise in writing, and as such, imparts a consideration, until it is shown to have none.—*Ib*. 747

See Pleadings, 42.

GUARDIAN AND WARD.

1. Where land is purchased by A. with the money of B., a trust results, by operation of law, in favor of B., although the title be taken by A. in his own name. But where a guardian was indebted to his ward, and purchased land

GUARDIAM AND WARD—*continued.*

which he declared was for the ward, paid for it with his own money, and put the ward in possession, but took the title in his own name—*Held*, that there was no resulting trust to the ward, and that in the absence of proof of an agreement that the land was to be received in payment of the debt, the ward had no title to it.....*Taliaferro* v. *The heirs of Taliaferro.* 404

HEIRS, LEGATEES AND DISTRIBUTEES.

1. When the plaintiffs claim title to land as the brother and descendants of a brother of the person last seized, it is not necessary to prove that the brothers were begotton in lawful wedlock: it is sufficient to show that they were the lawful brothers and legal heirs of the deceased.—*Bonner* v. *Greenlee's heirs.* 411
2. Where the parties who are seeking a settlement of the executors by the orphans court, are described in the record as legatees, their interest is sufficiently shown, though not formally propounded.—*Davis* v. *Davis, et al.* 611
3. Where several legatees are entitled to recover distinct sums of the executor, the decree should be in favor of each for his share, and not for a consolidated amount in favor of all.—*Ib.*.....611
4. A legatee of personal property cannot maintain an action for the recovery of his legacy, unless the will has been regularly admitted to probate.—*Shephard, et al.* v. *Nabors.* 631
5. Heirs or distributees are not competent witnesses for the executor or administrator to establish a claim in favor of the estate, although they execute releases of all their interest in the demand in suit.—*Williams' ex'rs* v. *Temple, adm'r.* 656

See Orphans' Court, 15.

HUSBAND AND WIFE.

1. A decree for the wife's distributive share must be rendered in favor of husband and wife.....*Blackwell, Adm'rx,* v. *Vastbinder.* 219
2. A testator, by will, directs that certain persons shall have full power and control over the property described in the will, "to be used and managed at their discretion, for the mutual use, benefit and interest of his daughter," (she then being a *feme covert,*) "and her surviving children: and as they come of age or marry, the property to be equally divided between her and them." This does not invest the wife with a separate estate; nor is the interest liable to subjection, by a suit in equity, for the payment of a promissory note executed by her together with her husband. Nor can the husband's interest in it be reached in a suit, where the allegations of the bill charge the estate to be one to the separate use of the wife....*Inge, et al.* v. *Forrester*.....418
3. C. delivered certain slaves to S., his creditor, the latter stipulating that when the wife of C. would pay him the debt intended to be secured by a pledge of the slaves, that he would settle them upon trustees to her separate use: the wife offered to pay the amount due to S., and demanded the slaves in obedience to his agreement; which he refused: *Held*, that the contract of S. made him a trustee *sub modo* for the wife, and that the tender of his demand entitled her to go into equity to enforce the execution of the trust.—*Sledge's adm'rs, et al.* v. *Clopton.* 589
4. If one person receives property from another, under an agreement to settle it on trustees for the benefit of the wife of the latter, a court of equity should

HUSBAND AND WIFE—*continued.*

not refuse to coerce an execution of the trust, because the details of the settlement cannot be ascertained by the most stringent proof.—*Ib*.....589

5. A proceeding in the orphans' court, instituted by husband and wife, to obtain the share of the wife in the estate, does not abate by the death of the wife; but the settlement may proceed at the instance of the husband as her administrator.—*Executors of Sankey* v. *The heirs of Sankey*. 607

6. The decree, in such a case, must be in favor of the administrator, and it would be error in the court to make distribution thereof among the distributees of the deceased wife. Such distribution could only be made in a proceeding between the distributees and the administrator.—*Ib*.....607

7. The husband is bound for the contracts of his wife during cohabitation, for necessaries suitable to his degree and station in life, without proof of assent on his part she should make such purchase.—*A. & W. Hughes* v. *Chadwick*. 651

8. In a prosecution by the State against a husband for an assault and battery on his wife, the wife is a competent witness for the husband to disprove the charge. —*The* v. *State Neill*.....685

See Evidence, 24.

INDICTMENT.

1. An indictment upon the statute, which charges both the *cruel* and *unusual* punishment of a slave, is not bad for duplicity.—*Turnipseed* v. *The State*. 664

2. Although the statute declares in general terms, that "No cruel or unusual punishment shall be inflicted on any slave," yet it is not enough that an indictment should merely pursue the words of the act; but it should allege what punishment was inflicted, and how.—*Ib*. 664

3. An indictment is unobjectionable, both in form and substance, which alleges a conspiracy falsely and fraudulently to seduce from her virtue, and carnally to know an unmarried female, by procuring the consent of herself and parents, to her marriage with one of the conspirators; and then in furtherance of such conspiracy, producing a forged licence, assuring them of its genuineness, falsely and fraudulently representing another of the conspirators to be authorised to celebrate the espousals, who actually performed the ceremony; in consequence of all which the daughter and her father and mother were deceived, &c., and she cohabited with her pretended husband. And in such case it is immaterial whether a licence was necessary to the validity of the marriage or not.—*The State* v. *Murphy* 765

4. A conspiracy to commit an offence is not merged when the conspiracy is executed, where the conspiracy and the act done are misdemeanors of the same grade but the indictment may be framed with a view to the punishment of either—*Ib* 765

5. In an indictment for feloniously receiving stolen goods, knowing the same to have been stolen, it is not necessary to allege the name of the thief; whether known or unknown; whether he was prosecuted or not; or to state the place where the larceny was committed.—*The State* v. *Murphy*. 845

6. An indictment which charges the felonious receiving of "sundry pieces of silver coin made current by law, usage and custom within the State of Alabama, amounting together to the sum of five hundred and thirty dollars and fifteen cents," does not describe the money with sufficient precision; but the number

INDICTMENT—*continued.*

and denomination of the coin should be stated. Yet the proof need not be as full and precise as the allegation, but the accused may be convicted if he is shown to be guilty in respect to either one of the coins alleged to have been feloniously received.—*Ib.* 846

7. Where a statute makes it an offence to "buy, receive, conceal or aid in the concealment of" stolen goods, &c., it prescribes four distinct offences, and the disjunctive "or" applies to each of the three verbs which precede, as well as to what follows; but an indictment which employs the terms "receive and conceal" in characterizing the offence, is good.—*Ib.* 846

8. An allegation that solen goods were feloniously received "with intent to defraud the owner," is sufficient, and refers directly to the individual whose name had been before mentioned as the owner.—*Ib.* 846

9. The crime of adultery consists in the illicit intercourse of two persons of different sexes, one of whom at least is married, and includes the crime of fornication. Upon an indictment for adultery, therefore, it is not necessary to allege that either of the offending parties were married. The term "adultery" implies the offence without the allegation of any other fact.—*The State* v. *Hinton and Watson* 864

INDORSEMENT.

1. When a judgment is obtained upon an assigned note, the note has lost its negotiable quality, and cannot again be assigned, so as to enable the assignee to sue in his own name.—*Sawyer* v. *Bradford, Assignee* 572

2. A negotiable instrument received before it is due, in payment of a pre existing debt, is received in the usual course of trade between merchants, and will protect the holder against a latent equity between the original parties, of which he had no notice.—*The Bank of Mobile, Hallett, et als.* v. *Hall* 639

3. A negotiable instrument received from the payee, before maturity, as an indemnity against future loss on a suretyship then existing on the part of the holder for the payee, is not a transfer in the usual course of trade, so as to preclude the maker from availing himself of a latent equity between him and the payee.—*Ib* 639

4. An agreement, contained in the body of a note, purporting to be in consideration of the hire of slaves, to return the slaves clothed as slaves usually are, is not assigned by the indorsement of the note, nor can the assignee maintain an action for the breach of it, when suing for the money due on the note. *Winston* v. *Metcalf* 757

5. The transfer of negotiable notes by a separate deed of assignment, without delivery of the notes themselves, is not an endorsement, or such transfer as will vest the legal title in the transferee according to the law merchant, but is the assignment merely of a *chose in action*.—*Hull & Leaceus* v. *The Planters and Merchants Bank of Mobile* 761

See Indorser and Indorsee, 10.

INDORSER AND INDORSEE.

1. When a bank accepts a proposition from the drawer of a bill to take into its possession a stock of goods to be applied *pro rata*, to all his debts, it is not a discharge of his indorsers, although the goods are afterwards taken and sold by the bank,

INDORSER AND INDORSEE—*continued.*

but the sum received is an extinguishment *pro tanto.—Ford, and another.* v. *The Branch of the Bank of the State of Alabama at Decatur*.....286

2. Where a further day of payment is given, by deed, to the principal debtor, he being the maker of several promissory notes, and the drawer of several bills of exchange, but a reservation is made in the deed that nothing contained in it shall bar or affect the right of the creditor to sue on any of the notes or bills at the request of any of the sureties; such a contract does not discharge the indorsers.—*P. H. & H. W. Prout* v. *Branch Bank at Decatur*.....309

3. Where the principal debtor, by deed, assigns property to a trustee for the payment of bills and notes upon which others are subsequent in liability, contracting thereby for delay, with a reservation by the creditor of the right to sue at the request of any surety, (in which event the deed was not to operate as a security for the debt thus sued,) and containing a condition that the debtor might sell the property, or remain in possession of it until the expiration of the time contracted for, is no discharge of the parties subsequent in liability, even if it is conceded that the deed, by reason of these stipulations, would be void as to a creditor.---*Ib.* 309

4. Where an action of assumpsit is brought against the payee, as indorser of a promissory note, payable at bank, and the defendant pleads the general issue, it is only necessary for the plaintiff to produce the note declared on with the payee's indorsement, prove that it was duly presented at the place appointed for its payment, show its non-payment, and that the defendants were seasonably advised thereof by notice given personally, or through the medium of the post-office.---*Travers' Ex'rs* v. *Boykin*.....353

5. When suit is brought on a promissory note, in the name of the payee, for the use of another, and is produced in evidence at the trial, it ought not to be excluded, although it appears, from an endorsement upon it, to have been assigned to one not connected with the suit; the legal presumption in such a case is that the note has been returned by the assignee to his assignor.—*Herndon, use of Woodward*, v. *Taylor*.....461

6. A negotiable instrument receiven before it is due, in payment of a pre-existing debt, is received in the usual course of trade between merchants, and will protect the holder against a latent equity between the original parties, of which he had no notice.---*The Bank of Mobile, Hallett, et als.* v. *Hall*.....639

7. The consent of the endorser of a note not payable in Bank, that suit may be delayed against the maker, does not discharge the other statutory condition requiring that the maker shall first be prosecuted to insolvency.—*Bates* v. *Ryland*.....668

8. Where a creditor on account of his debt, accepts the note of a third person from, and endorsed by his debtor, the creditor, upon its dishonor, is entitled to declare either on the endorsement or for the precedent debt; but in either case he is bound to shew the same degree of diligence.---*Ib*.....668

9. The transfer of negotiable notes by a separate deed of assignment, without delivery of the notes themselves, is not an endorsement, or such transfer as will vest the legal title in the transferee according to the law merchant, but is the assignment merely of a *chose in action*.---*Hull & Leavens* v. *The Planters and Merchants Bank of Mobile*.....761

10. Where a promissory note, payable in Bank, is transferred by indorsement, af-

INDORSER AND INDORSEE—*continued.*

ter maturity, to entitle the indorsee to charge the indorser, he should demand payment of the maker within a reasonable time after he became the proprietor of the paper, and if refused, give notice of non-payment to the indorser: and the insolvency of the maker at the time of the transfer will not excuse the indorsee's neglect thus to proceed ---*Adams' Adm'r* v *Torbert* 865

See Indorsement, 4.

INFANT AND INFANCY.

1. Although infancy is a personal privilege, yet not only the infant may avail himself of it, but his executor or administrator when sued upon the intestate's contract, may also plead it....*Jefford's Adm'r* v *Ringgold & Co.*.....544
2. An executor or administrator may ratify the contract of his intestate made during his infancy, although the intestate died before he attained his majority; and such ratification will be obligatory, though it was verbally made, without any new consideration....*Ib*.....544
3. A bond in which the obligor promises "to pay James W. Camp for the benefit of Alfred Turner," may be declared on as a bond payable to James W. Camp. *Turner* v. *Eldridge*.....821
4. The meaning of the promise is, that it is for the use of Alfred Turner.... *Ib.* 821
5. The fact that the beneficiary is a minor, and the obligor, his father, cannot be pleaded in bar of the action....*Ib*.....821

See Judgment and Decree, 12, 13.

See Orphans' Court, 8. 9.

INSOLVENT DEBTOR.

1. A court of equity has no jurisdiction to relieve a debtor from applying for his discharge, under the act to abolish imprisonment for debt, on the ground that he has removed his property from this to another State to avoid paying his creditor. The right to a discharge is a legal question with which a court of equity has nothing to do....*Croom* v. *Davis, et al.*.....40
2. When a debtor applies to be discharged, under the act abolishing imprisonment for debt, and his schedule shows that he has property in another State, he is not compelled to bring it into the jurisdiction of this, as a condition of his discharge.—*Ib*.....40
3. A covenent to sue certain persons to insolvency, does not require a suit to be brought, if the person to be sued absconds from the State, and in such a case proof of the insolvency of the party will be sufficient..*Pollard et al* v *Murrell* 661
4. To establish the fact of insolvency under this covenant, it is not necessary to do more than to exhaust the usual remedies provided by law for the collection of debts...it is not necessary to sue out a *ca. sa.* since the passage of the act abolishing imprisonment for debt...or to proceed against the sheriff for a false return.—*Ib*.....661
5. An allegation in a bill in chancery that a person had been sued to insolvency, is not established by proof that he had left the State insolvent.—*Ib*.....661

See Action, 4.

See Jurisdiction, 3.

INTENDMENTS AND LEGAL PRESUMPTIONS.

1. In the absence of proof showing the contrary, the English common law, when consistent with our institutions, will be presumed to be the rule of decision in a sister State.—*Shepherd, et al.* v. *Nabors*.....631
2. If it be shown that the alteration has been made, but it is not proved by whom, the jury may, in the absence of proof to the contrary, infer that it was made by the payee or holder, but the court cannot draw such inference as matter of law....*Davis* v. *Carlisle*.....707
3. The assent of the grantee to a deed *beneficial to him*, will be presumed, although it may be recorded without having been executed by him.—*Mallory* v. *Stodder*.....801
4. A bill of exceptions must always be taken most strongly against the party excepting; and where it states facts which show that a person had a considerable length of time, previously became the purchaser of land, and his right to occupy it was during all that time undisputed, it will be intended against the party excepting and in favor of his adversary, that the purchaser was in possession —*Ib*.....801
5. When copies of a libel are offered in evidence, instead of the original, which are stated in the record to be *substantial* copies of the original, if the copies are not set out in the record, this court will presume, after verdict, that the variance between the copies and the original, was immaterial.. *Weir v. Hoss and Wife*.....882

See Attachment, 13.

See Ejectment, and Trespass to Try Title, 6.

See Entry, 3.

See Evidence, 24.

See Garnishment and Garnishee, 12.

See Judgment and Decree, 10.

JUDGMENT AND DECREE.

1. A former judgment is a bar only in reference to the subject matter of the suit; and the points there put in issue and determined. When, therefore it is proposed to show, by the record of a judgment, that a certain matter was decided, it must appear from the record that such matter was in issue, and then parol evidence is admissible to show, that the matter was, in fact, submitted to the jury. If the matter was not within the issue, such testimony is not admissible, as it would be, in effect, to contradict the record.—*Davidson & Stringfellow* v. *Shipman, et als.*.....27
2. When judgment is rendered for the defendant, on a demurrer to a plea in abatement, it is error if the court refuse to permit the plaintiff to take issue on the facts of the plea.—*Chilton & Bowdon* v. *Harbin*.....171
3. The decision of the commissioners, appointed under the 12th section of the act of 1843, that a claim against the county, is valid, is conclusive upon the county.....*Cuthbert, et als.* v. *Lewis*.....262
4. A declaration by the commissioners, of the fund out of which a claim declared valid by them is to be paid, is void for want of authority, and therefore the county court cannot take jurisdiction, by appeal from such a determination of the commissioners, and its judgment on such appeal is a nullity....*Ib*.....262

JUDGMENT AND DECREE—*continued.*

5. When a claim has been declared valid by the commissioners, it is the duty of the court of roads and revenue to make the necessary order, and if it refuses, a *mandamus* is the proper remedy.....*Ib.* 262
6. A confession of judgment, by the defendant, of part of the plaintiff's demand, and a continuance of the residue, on his motion, is a consent on his part, to a severance of the claim, and it cannot afterwards be objected by him, on error, that two final judgments were rendered in the same cause.—*Henderson* v. *Henry.* 361
7. When lands are subjected to sale at the suit of an administrator, under the act of 1822, and a conveyance is made to the purchaser by the administrator, but there is no final decree by which he has been directed to convey the title, the title of the heirs at law, is not divested.—*Bonner* v. *Greenlee's heirs.* 411
8. *Quere.* If, under the act of 1822, the administrator is appointed sole commissioner to conduct the sale, and does so, and afterwards makes a report, setting out the sale and conveyance by him, and the judge of the county court endorsed the report, as approved by him, and orders it to be filed and recorded among the papers of the estate, is this order a final decree, or will it furnish evidence to warrant a decree *nunc pro tunc?—Ib.*.....411
9. Where the plaintiff in a judgment receives a partial payment thereon, and agrees to *stay the same for six months*, and no execution issues until the expiration of the period, the agreement will be considered voluntary, and the lien of the judgment override and defeat a conveyance made by the defendant during the time the indulgence was granted.—*Doe ex dem Leverich & Co.* v. *Bates.* 480
10. The judgment entry recited the appearance of the defendants, by J. P S. who confessed a judgment for them under a power of attorney, which was filed with the papers in the cause: *Held*, 1. That the defendants having appeared by attorney, could not object to the want or irregularity of the service of process. 2. That the mere production of the power of attorney did not make it part of the record, but that the recital of its contents was sufficient to support the judgment. 3. That it was not a conclusion of law, that the power of attorney was not the act of both the defendants, because it was executed in the firm name. 4 That although the judgment would have been more technical if it had affirmed the power of attorney was duly proved, yet it might be intended that its execution was satisfactorily shown.—*Bissell & Carville* v. *Carville & Co.* 503
11. A judgment in a summary proceeding at the suit of a bank against the drawer of a bill of exchange, is sufficiently certain, which states that the bill was presented for payment at "maturity," without specifying the day.—*Crawford* v. *The Branch Bank at Decatur.* 574
12. No decree can be rendered by by the orphans' court, unless the infant heirs or distributees are represented by a guardian *ad litem.—Executors of Sankey* v. *The heirs of Sankey.* 607
13. The decree must be in favor of the infant, and not of his guardian.—*Ib.* 607
14. Where several legatees are entitled to recover distinct sums of the executor, the decree should be in favor of each for his share, and not for a consolidated amount in favor of all.—*Davis* v. *Davis, et al.*.....611
15. It is no objection to a decree of the orphans' court, on final settlement of an executor's account, that it outhorizes an execution to issue *de honis propriis*—*Ib*611

JUDGMENT AND DECREE—*continued.*

16. The judgment upon a recognizance should show that the party charged with an offence, was required to answer the charge specified therein.—*Farr & Sampson* v. *The State.* 795

17. A joint judgment against two defendants, one upon verdict, and the other by *nil dicit*, is regular.—*Weaver & Gains* v. *Crenshaw.* 873

See Appeals and Certiorari, 2.

See Garnishee, 1.

See Lien, 3.

See Process, Service of, 4.

See Set-off, 7.

JURISDICTION.

1. The circuit court has exclusive jurisdiction of all claims to property levied on, whether the execution issues from that or another court.—*Cullum* v. *Smith & Conklin.* 625

2. The defendants being sued on a specialty, for the payment of four hundred dollars, pleaded in bar that they had been summoned as garnishees, at the suit of L. S. F., who had recovered several judgments against the plaintiff, before a justice of the peace, to state how much they were indebted to the latter; that they admitted they owed him two hundred dollars on the specialty, and no more, and their answer was contested before the justice, who after hearing the evidence, adjudged that the same was true. Several judgments were rendered by the justice against them as garnishees, amounting to the sum admitted to be due—all of which have been satisfied: *Held*, that the sum of two hundred dollars, the sum then in controversy, being beyond the jurisdiction of the justice of the peace, the inquiry as to the defendants' indebtedness, and the decision thereon, did not sustain a plea of "Former recovery," or in any manner affect the plaintiff's rights.—*Cameron* v. *Stollenwerck, and another.* 704

3. A judge of the county court is authorized to issue the writ of *habeas corpus* in all cases where the detention is claimed by virtue of civil process, and is empowered to judge of its validity in every aspect; he is therefore not liable to an action for discharging a debtor arrested on a *ca. sa.*—*Morrow & Nelson* v. *Bird.* 834

4. The Circuit Court may take jurisdiction by *certiorari*, of a case in which the intendant of a corporate town has rendered a judgment against a person resident within the same, for the violation of one of its by-laws.—*The Intendant and Council of the town of Marion* v. *Chandler.* 899

See Executors and Administrators, 19.

See Orphans' Court, 16.

JURY.

1. It is not error for the court to permit the jury, after they have dispersed, again to retire, and make a re-calculation of the interest, if upon their return the plaintiff object to receiving their verdict, and the verdict previously rendered is not disturbed.....*Turner* v. *Eldridge* 821

JUSTICE OF THE PEACE.

See Garnishment and Garnishee, 9.

LANDLORD AND TENANT.

1. A tenant, when sued for the possession of demised premises, by the landlord, is precluded, as well during its continuance, as after its termination from calling in question the title of his landlord, or setting up an outstanding title in a stranger.—*Shelton, et al.* v. *Doe ex dem. Eslava*. 230
2. The only effect of a disclaimer of the title of the landlord, by the tenant, is, to bar the entry of the landlord, if after knowledge of such disclaimer he permits the tenant to remain in possession until the statute of limitations forbids an entry.—*Ib.* 230
3. A landlord, upon making the affidavit prescribed by the second section of the act of 1843, is entitled to the process of attachment, and it is not necessary that it should be stated that the attachment is not sued out for the purpose of vexing or harrassing the defendant.—*Hawkins* v. *Gill*. 620
4. The design of the act was to make the landlord's *lien* on the crop more effectual; the attachment therefore is properly issued against the crop grown on the land.—*Ib.* 620

LAND TITLES

1. The power given to the registers and receivers by the different acts of Congress, to determine between conflicting and interfering claims, and to direct the manner of locating and surveying them, applies only to confirmation of imperfect grants made by the former proprietors of the country. These officers have, therefore, no power to locate and direct the survey of a disputed line, where one of the parties claims by virtue of a complete and unconditional grant; as in the case of the donation to the corporation of Mobile of the hospital and bake-house lots, by the act of 26th May, 1824.—*Mayor and Aldermen Mobile* v. *The heirs of Farmer*.....738

See Deed, Registration of, 2, 3.

See Entry, 1, 2, 3, 4.

LAW MERCHANT.

1. A negotiable instrument received before it is due, in payment of a pre-existing debt, is received in the usual course of trade between merchants, and will protect the holder against a latent equity between the original parties, of which he had no notice.—*The Bank of Mobile, Hallett, et als.* v. *Hall*.....639
2. A negotiable instrument received from the payee, before maturity, as an indemnity against future loss on a suretyship then existing on the part of the holder for the payee, is not a transfer in the usual course of trade, so as to preclude the maker from availing himself of a latent equity between him and the payee.—*Ib*..... 639

LEGACY AND DISTRIBUTIVE SHARE.

1. A decree for the wife's distributive share must be rendered in favor of husband and wife.—*Blackwell, Adm'x* v. *Vastbinder*.....219

LESSOR AND LESSEE.

1. The section of the act of 1807, "concerning executions, &c.," which inhibits the removal of goods and chattels, levied on by execution, from any messuage, lands, &c., leased, &c., until the payment of the money due for rent of the premises, only gives a lien for the rent due at the time of the levy, and not for

LESSOR AND LESSEE—*continued.*

what is then accruing, and to become due at some future period.—*Whidden* v. *Toulmin* 104

2. Where the sheriff levies process on goods of a tenant in a house leased to him, he is not liable to the landlord for its use and occupation, if the possession has not been demanded, and he merely retains the key, using the house for the safe-keeping of the goods...the lease continuing during all the time of the sheriff's occupancy.—*Ib* 104

3. The act of 1821, [Clay's Dig. 506, § 3,] does not give the landlord a lien on the crop raised on the rented land; it merely declares that, as between the landlord and an execution creditor, the former shall be entitled to preference, to the extent of one year's unpaid rent.---*Frazier, use, &c.* v. *Thomas*.....169

LIBEL.

1. A publication, the tendency of which is to expose the party to ridicule, contempt and disgrace, is, if maliciously or wantonly done, a libel.---*Weir* v. *Hoss and Wife*.....881

2. When the libel had spoken of the plaintiff as the "Filly horse," and *innuendo* that the plaintiff's wife was meant, held to be correct—her name being *Hoss*.---*Ib*.....881

3. To constitute a libel, it must be published as well as written, and if copies of the writing are taken without the consent of the author, the offence is not complete.—*Ib* 882

LIEN.

1. Where personal property is levied on by attachment, and a replevy bond executed, conditioned to have the same forthcoming to abide such judgment as may be rendered in the cause, the property cannot be levied on by an execution, the lien of which is not paramount, until it is discharged from all liability to satisfy the attachment on the judgment therein.---*Rives & Owen* v. *Wilborne*.....46

2. The act of 1821, [Clay's Dig. 506, § 3,] does not give the landlord a lien on the crop raised on the rented land; it merely declares that, as between the landlord and an execution creditor, the former shall be entitled to preference, to the extent of one year's unpaid rent.—*Frazier, use, &c.* v. *Thomas*.....169

3. Where an injunction is awarded at the instance of a *stranger*, to restrain the collection of a judgment by the sale of property levied on, and a bond executed with surety, the lien of the judgment is not thereby impaired; and upon the dissolution of the injunction, the plaintiff's execution will be entitled to priority, as against other creditors or purchasers, whose liens attached while the injunction was in force.—*Bartlett & Waring* v. *Doe ex dem. Gayle & Phillips* 305

4. Where the vendor of land takes notes with security, and gives a bond to make titles when the notes are paid, if he afterwards indorses one of the notes, and the indorsee discharges the surety, he is not entitled to enforce the vendor's lien upon the land.—*Martin* v. *Lundie*.....427

5. Where the plaintiff in a judgment receives a partial payment thereon, and agrees to *stay the same for six months*, and no execution issues until the expiration of that period, the agreement will be considered voluntary, and the lien of the judgment override and defeat a conveyance made by the defendant du-

LIEN—*continued.*

ring the time the indulgence was granted ---*Doe ex dem. Leverich & Co* v. *Bates* 480

6. A mere agreement to ship goods in satisfaction of antecedent advances, will not, in general, give the factor or consignee a lien upon them for his general balance until they come to his actual possession; but if there is a specific pledge or appropriation of certain ascertained goods, with the intention that they shall be a security, or the proceeds as a payment, and they are deposited with a bailee; then the property is changed and vests in the individual to whom they are to be delivered.—*Deska, Sheppard & Co.* v. *Pope & Son* 690

7. When a debt due by promissory note is attached by garnishee process, the service creates a lien upon the debt, which cannot be defeated by a subsequent *bona fide* transfer by the payee of the note to a third person, notwithstanding the entire ignorance of the assignee of the process or its service.---*Dore* v. *Dawson* 712

See Admiralty Proceedings, 1, 2.

See Execution, 1.

See Principal and Agent, 3, 4.

LIMITATIONS, STATUTE OF.

1. A father, by deed, conveyed certain slaves to his son, stipulating at the time, by parol, for the possession of the slaves during his life, and retained the possession about sixteen years, when the son obtained the possession of one of them without the father's consent. The father having brought an action to recover the slave—*Held*, 1st. That as between him and his son, no length of time would ripen his possession into a title, unless it was held by him adverse to the title of his son. 2d. That to show the character of the possession, it was competent for the son to prove the parol agreement relating to it.—*Strong* v. *Strong*. 345

2. The statute of limitations of 1802, "For the limitation of actions," does not begin to run against a married woman, until she becomes *discovert;* nor will the staleness of the demand prevent a recovery, where the statute has not completed a bar.---*Sledge's Adm'rs, et al.* v. *Clopton* 589

3. The State Bank is a mere corporation, not invested with the attributes of sovereignty, and like an ordinary creditor must cause a claim, of which it is the proprietor, to be presented to the administrator of a deceased debtor, within eighteen months after the grant of administration.---*The Bank of the State of Alabama* v. *Gibson's Adm'rs* 814

MANDAMUS

1. A Judge of the Circuit Court is not authorised to award a *mandamus* in vacation, and the refusal to do so, however meritorious the grounds of the application may be, does not authorise the Supreme Court in virtue of its general superintendence and control of inferior jurisdictions, to grant the writ.---*Ex parte Grant, adm'r de bonis non, of the estate of M'Cord, deceased* 91

2. A writ of error will not lie, from an order of court, permitting a sheriff to amend his return to a *fieri facias;* the party prejudiced by such order has a remedy by *mandamus*, to cause it to be vacated.---*Kemp & Buckey* v. *Porter* 172

3. A declaration by the commissioners, of the fund out of which a claim declared

MANDAMUS—*continued.*

valid by them is to be paid, is void for want of authority, and therefore the county court cannot take jurisdiction, by appeal from such a determination of the commissioners, and its judgment on such appeal is a nullity.----*Cuthbert et als.* v. *Lewis*.....262

4. When a claim has been declared valid by the commissioners, it is the duty of the court of roads and revenue to make the necessary order, and if it refuses, a *mandamus* is the proper remedy. ---*Ib.*.....262

5. A mandamus will not lie to compel a judge of the county court to accept a bond tendered by the sheriff; he having adjudged it insufficient, and for that cause, having declared the office vacant.—*The State*, &c. v. *Bowen*. 511

See Discontinuance, 1.

MARRIAGE.

1. *Quere?* Are not the statutes in respect to the obtaining a licence to celebrate the contract of espousal, and the form of its solemnization, directory merely; and is it not competent for persons of proper age to consummate the contract *per verba de præsenti*, without a license, or the interposition of one of the functionaries, designated by the law.—*The State* v. *Murphy*.....765

See Indictment, 3.

MASTER AND SLAVE.

1. Upon the hirer of a slave refusing to provide necessary medical attendance for the slave, and insisting on his laboring when physically unable to do so, the owner may take possession of the slave for the purpose of having medical aid afforded him; and upon the refusal of the hirer again to receive the slave when restored to health, so as to be able to work, the entire amount of the hire is recoverable.----*Hogan* v. *Carr & Anderson*.....471

MORTGAGOR AND MORTGAGEE.

1. Whether a mortgage of articles of merchandize, which the mortgagor has the right to *use*, sell and dispose of, for the purpose of paying the mortgage debt, is not fraudulent *per se*—*Quere.*—*Wiswall* v. *Ticknor and Day*.....179

2. If the mortgagee has indorsed the notes and assigned the mortgage by which they were intended to be secured, he is not *prima facie* a necessary party to a bill brought for a foreclosure; and a bill which makes his heirs parties, must show their interest by proper allegations, and should contain a prayer for relief and process against them.—*Walker, et al.* v. *The Bank of Mobile*.....452

3. Where infants are defendants to a bill of foreclosure, the master should ascertain and report whether it was for their interest to sell the mortgaged property in separate lots, whether a division can be conveniently made, and which parcel their interest requires should be sold: *Further*, that he should report such a statement of the evidence as would enable the court to judge of the justness of his conclusions, if questioned.—*Ib.*.....452

4. Upon the forfeiture of a mortgage, the mortgagee becomes not only entitled to the possession of the mortgaged premises, but also to the rent then in arrear and unpaid, upon notice to the tenant in possession.---- *Coker* v. *Pearsall*..... .542

5. Where the maker of promissory notes, payable to his own order, executes a

MORTGAGOR AND MORTGAGEE —*continued.*

mortgage to a third person to secure their payment, he thereby admits that they are valid securities for the payment of money in the hands of the mortgagee, whether regularly indorsed or not.----*Hartwell and Wilkins* v. *Blocker*.....581

See Fraud and Fraudulent Conveyances, 2.

NEW TRIAL.

1. As it is a matter within the discretion of the court trying a cause, to grant or refuse a new trial, the refusal to grant it, on the ground that the motion therefor was not made in due time, is not revisable *on error*.—*Hilliard, by next friend*, v. *Carr and Ketchum*.....557

2. The court has the power, after a conviction for a felony, to grant a new trial, with the consent of the prisoner, and the verdict and judgment will be no bar to his being again tried for the same offence.—*The State* v. *Stack*.....676

NOTICE.

1. The notice issued at the suit of a Bank requiring its debtor to answer to an allegation of indebtedness, is process to bring the latter into court; but after the motion for judgment has been submitted, it may be regarded as a motion in writing, identifying the debt, to which the defendant may either demur or plead to issue.----*Griffin* v. *The Bank of the State of Alabama*.....908

2. Where a notice of a motion for judgment in favor of a Bank states the time when the note was discounted, so as to show that it was before it bears date, this statement, as it is unnecessary, may be treated as surplusage.----*Ib* 908

3. A notice at the suit of a Bank need not be dated, unless the date is made material by a reference to it, as indicating the time when the motion will be made, &c; and although the indorsement of its receipt by the sheriff shows that the notice was placed in his hands before the maturity of the debt, yet if it is not served until after the debt is due, no objection can be made to this defect in the notice.---*Ib*.....908

4. The plea of *non assumpsit* to a notice of a motion for judgment at the suit of the Bank, throws upon the plaintiff the *onus* of proving the material facts stated in the notice; and if the note sought to be recovered is misdescribed as to the time of its maturity, the variance will be fatal to the motion.---*Ib*. 908

OPEN ACCOUNTS.

1. One species of open accounts is, when there are running or current dealings between the parties which are kept unclosed with the expectation of fresher transactions.---*Goodwin, use of Hale, adm'r of Woods* v. *Harrison*.....133

ORPHANS' COURT.

1. The county court has not jurisdiction to order a sale of lands, for the purpose of more equal distribution, unless the petition of the executor or administrator sets forth and particularly describes the heirs of the deceased.—*Blann* v *Grant*. 110

2. *Semble:* It is competent for the judge of the county court to set aside the probate of a will, which he had previously allowed without proof, or upon insufficient proof, and without notice to the widow and next of kin, as directed by statute.---*The heirs and distributees of Hill* v. *Hill's executors*.....106

3. A citation to an administratrix, which calls her "to make a showing of how

ORPHANS' COURT—*continued.*

and in what manner she has administered and disposed of the estate of the deceased, will not authorize the judge of the county court, on her failing to appear, to make a final settlement of the estate--*Blackwell, Ad'x* v. *Vastbinder* 218

4. When an administrator is cited for final settlement, and fails to appear, no final judgment can be rendered at the return of the citation; but the judge should proceed and state the account, and cause notice to be given him that unless he appeared at the next term of the court, and filed his accounts and vouchers for settlement, the account so stated would be reported for allowance--*Ib* 219

5. An executor, by appearing and submitting to account, waives all objection to the citation.---*The Executors of Sankey* v. *The Heirs of Sankey*.....607

6. A proceeding in the orphans' court, instituted by husband and wife, to obtain the share of the wife in the estate, does not abate by the death of the wife; but the settlement may proceed at the instance of the husband as her administrator.-*Ib* 607

7. The decree, in such a case, must be in favor of the administrator, and it would be error in the court to make distribution thereof among the distributees of the deceased wife. Such distribution could only be made in a proceeding between the distributees and the administrator.---*Ib*.....607

8. No decree can be rendered by the orphans' court, unless the infant heirs or distributees are represented by a guardian *ad litem.—Ib*.....607

9. The decree must be in favor of the infant, and not of his guardian —*Ib*. 607

10. The statute requiring the judge of the county court to appoint not less than one day in each month, to hear and determine such cases as are cognizable in vacation, if a decree is made in vacation in such a case, it will be intended that it was rendered at a regular return day, where the record shows nothing to the contrary.—*Davis* v. *Davis, et al*.....611

11. Wh re the parties who are seeking a settlement of the executors by the orphans court, are described in the record as legatees, their interest is sufficiently shown, though not formally propounded.—*Ib*. 611

12. The act which requires notice to be published, &c. when an executor's account will be reported for allowance by the judge of the orphans' court, is for the benefit of creditors, &c., and an executor cannot object on error that publication was not regularly made.---*Ib* 611

13. Where several legatees are entitled to recover distinct sums of the executor, the decree should be in favor of each for his share, and not for a consolidated amount in favor of all.—*Ib*.....611

14. It is no objection to a decree of the orphans' court, on final settlement of an executor's account, that it authorizes an execution to issue *de bonis propriis*--*Ib*611

15. The statute which requires the execution of a refunding bond, where a legatee petitions the orphans' court for his legacy, does not apply where the executor finally settles his accounts.—*Ib*.....611

16. A report by the administrator, that the estate represented by him is insolvent, is necessary to give the county court jurisdiction to decree against him in favor of creditors: and a report of insolvency made by a previous administrator, has no effect on a subsequent administrator, *de bonis non*.---*Lambeth and Wife* v. *Garber, et al.* 870

See Error and Writ of, 19.

PARENT AND CHILD.

1. Where a father, upon the marriage of his daughter, or afterwards, sends home a slave with her, which remains in the husband's possession for ten years, the presumption that it was a gift, must be explained or rebutted by satisfactory proof that it was notoriously understood not to be a gift at the time: and even if there is such proof, it is not too much to say that a strong presumption arises, which will warrant the inference of a subsequent absolute gift, when the contest is between a creditor and the donor.—*Hill & Dill* v. *Duke*. 259
2. A father being obliged to support his children, is entitled to their services during minority, and to the product of their labor, so long as they remain members of his family, but if he drive them away, or voluntarily permit them to leave him, and provide for themselves, he is not entitled to their earnings.—*Godfrey* v *Hays* 501
3. Where a father made a contract with his son, *then living with him*, that he would give him a slave for doing certain work upon a mill, which was done, and the slave conveyed to the son—*held*, that the slave could be taken in execution at the suit of the creditors of the father.—*Ib*. 501
4. A gift of slaves by a father to a son is void as against existing creditors.—*Moore* v. *Spence*. 506

See Will and Probate of, 8.

PARTNERS AND PARTNERSHIP.

1. One partner is not authorised, from his connexion in business, to accept a bill as a security for the debt of a third person: and an authority cannot be inferred from the circumstance that the business of the firm is that of commission merchants, to sell cotton, when the plaintiff is aware of all the circumstances under which the acceptance is given.—*Hibler & Pearson* v. *De Forest, Morris & Wilkins* 92
2. The plaintiff, defendant and J. P., composed the firm of J. & P. P. & Co.; the former being temporarily absent from the city in which the firm did business, appointed the defendant his agent to hire out his negroes, rent his houses, and collect the hire and rent of the same. All which was undertaken by the defendant, who upon the return of the plaintiff, acknowledged in writing, that there was due to the plaintiff, for monies collected from his effects, and put into the house of J. & P. P. & Co., while he was acting as his agent from 1st March, 1837, to 1st Dec. 1838, the sum of $540 16-100 above what he had paid out for him. The partnership had no interest in the negroes and land: *Held*, that the acceptance of the writing, did not make it necessary for the plaintiff to resort to the firm for payment; but the proof entitled him to recover the amount, with interest, of the defendant, individually.—*Paine* v *Moore*.....129
3. One who purchases goods in the name of another, is not liable to be charged as a partner, although he is to receive one-half of the net profits of all the purchases made by him, if it appears that he is in fact an agent only, and that the agreement to share the profits is only a mode of compensation.—*Hodges v. Dawes & Co*.....215
4. Where one partner commingles the money of the firm with his own cash, so that it cannot be distinguished, he is chargeable *pro tanto* in an account with his copartners, as for a conversion; and if in such case the money come to the

PARTNERS AND PARTNERSHIP—*continued.*

hands of the administrator of the partner converting it, *it seems*, that an action against him for money had and received, cannot be supported by the surviving members of the firm.---*Calvert* v. *Marlow, surviving partner*, &c. 338

5. *Semble:* An action of *assumpsit* cannot be maintained by a surviving partner against the representative of a deceased co-partner for the recovery of a debt due by the latter to the firm, or for money in hand at the time of his death; unless the partnership accounts have been settled, and a balance struck. The remedy in such case, is in equity.---*Ib*.....338

6. An unincorporated body of individuals, issuing notes, are liable as partners, and therefore, under the statute of this State, the defence that the defendant had withdrawn from the association before the note sued on was issued, can only be given in evidence under the plea of *non est factum*.---*Montgomery* v. *Elliott, use*, &c.....701

7. In a suit by two as partners, it is admissible for the defendant, under the general issue, to prove that the debt sued for is due to one of them, and not to the plaintiffs jointly. The statute dispensing with proof of the partnership, unless put in issue by plea in abatement, [Clay's Dig. 324, § 68,] does not apply when the contract is with an individual, and the suit is by a partnership.---*Kenan* v. *Starke and More*.....773

8. The admission of one person that another was his partner, is not evidence to establish the existence of a partnership, and the fact that the party making the admission is not sued in the same action, or is dead, can have no influence upon the admissibility of the evidence: the representatives of a deceased partner are made liable at law, if the survivors are insolvent.---*Thornton* v. *Kerr & Hope* 823

9. The declaration alleged that the defendant's intestate, as a member of the firm of A L & Co, which was continued for the purposes of liquidation, but in other respects was dissolved, made a promissory note in their name, for the payment of a pre-existing debt of the firm, to the plaintiff: *Held*, that it could not be intended from the declaration, that the firm were liable to the payment of the note, but it imposed an individual responsibility upon the intestate, for which his administrator was suable.---*Fontaine & Freeman, use, &c.* v. *Lee's Adm'rs*..... 889

10. Where the same person was a partner in two partnerships, and one of the partnerships executes its note to the other, or becomes otherwise indebted, the death of the common partner removes the impediment to a suit at law to recover the demand, and the survivor of the one concern may sue the survivors of the other, at law.---*Lacy* v. *Le Bruce and Prince*.....904

See Error, Writ of, 20.

PLEADINGS.

1. The indorser of a bill of exchange, being sued on his indorsement, pleaded that the bill was made to be negotiated to the plaintiff; that the consideration of the defendant's indorsement was the previous deposit, by the drawer, of ten bales of cotton in the ware-house at D; for which, at the time of the negotiation of the bill, he gave the plaintiff the receipt of, or order upon, the ware-house keeper. *Further*, that the cotton was of the value of one thousand dollars; that the plaintiff agreed with the defendant to take and sell the same, and apply the pro-

PLEADINGS—*continued.*

ceeds thereof to the discharge of the bill before the defendant should be called on to discharge any part of it—All which the plaintiff has failed to do: *Held*, 1. It cannot be assumed, that the arrangement between the plaintiff and drawer, was not in writing. 2. That the plea would tolerate the admission of evidence to bar the action; though it might, perhaps, be competent for the plaintiff to show the removal or destruction of the cotton, so that it could not be obtained.—*Bank of The State of Alabama* v. *Whitlow* 135

2. Where a suit is brought in the name of one person, for the use of another, the defendant may plead either in bar or abatement, that the nominal plaintiff was dead *at the commencement of the suit*—*Jenks* v. *Edwards, use*, &c 143

3. In an action against a sheriff for failing to levy an attachment on a sufficiency of the property of the defendant therein, the declaration alleged that a *venditioni exponas* had been placed in the sheriff's hands, requiring him to sell so much of the estate which he had been commanded to attach, as was of value sufficient to satisfy the judgment and costs rendered in that suit: *Held*, that so much of the declaration as related to the *venditioni exponas*, might, if necessary, be rejected as surplusage; and an averment that the plaintiff had sustained damage to a greater amount than the debt sought to be recovered, was under the act of 1824, equivalent to an averment that the same was unpaid.—*Griffin* v. *Gunaway* 148

4. Where, in an action for failing to levy an attachment on a sufficiency of property to satisfy the debt, the declaration correctly describes the proceedings, as to parties, date of attachment, and amount of judgment rendered therein, the variance of *a quarter of a cent* between the description in the declaration and the attachment, does not authorise the exclusion of the latter as evidence.—*Ib*.....148

5 An action against a sheriff for failing to levy process, cannot be supported by proof that the money had been collected by him —*Ib*.....148

6. In an action by the indorsee against the indorser of a promissory note, payable in bank, on the 1st November, 1839, the declaration alleges "that afterwards when the said note was due and payable, according to its tenor and effect, to-wit, on the 3d of August, 1839, it was presented, &c," and continues the mistake of the time of payment, in the averment of protest and notice, but always under a *scilicit*, the mistake cannot be reached by demurrer, nor as a variance; consequently it is not available on error after judgment by default.—*Crawford* v. *Camfield*.....153

7. A count, of a declaration asserting that a landlord had a lien upon certain chattels, which has been destroyed by the act of the defendant, is bad, without showing how the lien was created: the existence of a lien is the conclusion of the law upon certain facts, and they should be stated, in order that a judgment may be formed of the existence of the lien.—*Frazier, use, &c. Thomas*....169

8. Where a plaintiff, suing by a *prochein ami*, describes himself in the writ and declaration, as an infant under the age of twenty-one years, and the defendant pleads "not guilty," and "accord and satisfaction," the pleadings admit the plaintiff's infancy; and in such case, a submission to arbitration and award not being obligatory on him, may be rejected as evidence.—*Hubbert* v. *Collier, by his next friend, &c*.....269

PLEADINGS—*continued.*

9. In an action of trespass, an arbitration and award must be specially pleaded, and cannot be given in evidence under the plea of accord and satisfaction.—*Ib* 269
10. In an action against a sheriff and sureties, on his bond, it is not necessary to allege a demand *specially*. The case of McBroom v. The Governor, [6 Porter 32,] *contra*, overruled.—*Hill, et als.* v. *Fitpatrick, Gov. use, &c*.....314
11. In a suit against the sheriff and his sureties on his bond, the latter cannot insist that they are not liable upon the bond described in the declaration, but upon one executed subsequently, unless they put the fact in issue by plea.—*Ib*.....314
12. An *alias pluries fi. fa.* is sufficiently described as an "execution."—*Ib* 314
13. Where a suit is commenced by attachment, the attachment is the initiatory process in the cause, and the defendant cannot, by demurring, bring its defects to the view of the court, or avail himself of a variance between it and the declaration; consequently a revising court will not look behind the declaration to ascertain whether the suit is brought for a less sum than the primary court could take jurisdiction of, unless the question was there regularly presented.—*Roberts* v. *Burke*.....348
14. Where defendants, sued as executors, plead *ne unques executors*, it is enough for the plaintiff to show on the trial of the issue, that they had received letters testamentary under a grant thereof by the county court, in order to throw upon the defendants the *onus* of sustaining their plea.—*Tarver's Ex'rs* v. *Boykin* 353
15. The declaration commenced thus: "D. A. G., who sues for the use of S. S., sheriff of T. Co. and successor of said D. A. G., complains, &c.," and then alleges that the defendants made and delivered their promissory note to the plaintiff, by which they "promised to pay, six months after the date thereof, to the plaintiff, by the name of D. A G., sheriff and administrator of the estate of J. C." The breach alleged, is, the non-payment of the note to the plaintiff, without negativing a payment to S: *He'd*, 1. That it cannot be assumed as a *legal conclusion*, that G. was administrator in virtue of his office of sheriff, nor that S. although his successor in the sheriffalty, was also administrator *de bonis non*, but the description of the latter as sheriff, if necessary, would be treated as a mere *descriptio personæ*. 2. That if S. succeeded G. in the administration, and thereby became the proprietor of the note, the defendant should have pleaded the fact. 3. That the breach was well assigned.-*King & Clarke* v. *Griffin, use, &c* 387
16. When an administrator declares, in a contract made with him in his representative character, *oyer* of his letters is not demandable.—*Harbin* v *Levi* 399
17. To a similar action, *ne unques administrator*, is a bad plea, for the representative character is admitted by making the contract.—*Ib*.....399
18. The judgment entry recites that the parties came "by their attornies, and the defendant suggests that the plaintiffs have resigned as administrators, of, &c., which fact being proved to the satisfaction of the court, and the defendant withdrawing his plea, says nothing in bar or preclusion of the plaintiff's demand. It is therefore considered. &c." *Held*, that it could not be inferred from the defendant's suggestion that the plaintiffs had resigned the administration; the fact not being admitted by them, it should have been asserted by plea regularly interposed, and tried by the jury, and the court was not competent to determine it upon hearing the evidence.—*Winslett* v. *McLemore's Adm'rs* 416

PLEADINGS—*continued.*

19. The declaration stated that certain notes, accounts, &c. were placed in the hands of M. an attorney at law, who undertook to collect them and pay the proceeds *to the creditors of B. S. & Co.*, and the breach alleged was a failure to collect and pay over the money: *Held*, that the declaration was not bad, for the omission to particularize by name, the creditors to whom the money collected, was to be paid.—*Mardis' Adm'rs* v. *Shackleford*.....433
20. It is allowable in pleading to refer, in a subsequent to a preceding count: and in an action against an attorney at law, for failing to collect and pay over the amount of certain notes, &c. intrusted to him for collection, if the notes, &c. are sufficiently identified in one count, the counts that follow, may refer to and adopt the description there made, without mentioning their respective amounts, and by whom due.—*Ib*.....433
21. A demurrer to a plea of the statute of limitations, pleaded by name only, with the consent of the parties, raises no question but the one whether the statute can be pleaded to the action.—*Goodwin, use*, &c. v. *Harrison* . 438
22. The omission to aver in a *scire facias*, to show cause why an execution should not issue on a judgment which had been affirmed in the Supreme Court, *that the record of the judgment remained in the inferior court*, cannot be taken advantage of on demurrer, as special demurrers have been abolished by statute.—*Barrow, Adm'r* v. *Pagles, et al*.....462
23. It is irregular to join two distinct matters of abatement in the same plea, and such a plea is bad on demurrer.—*Cobb* v. *Force, Brothers & Co*.....468
24. A declaration, at the suit of an administrator, upon a promissory note payable to his intestate, should allege that payment was not made either to the deceased in his life-time, or the plaintiff since his death; and if it merely negatives a payment to the plaintiff, it is bad *on demurrer*.—*Stallings* v. *Williams' Adm'r*.....509
25. The plea of *ne unques executor*, is a plea to the merits within the meaning of the act of 1824, which authorises a defendant, whose demurrer is overruled, to withdraw the same and plead to the merits of the action.—*Ib*.....509
26. In an action against an administrator, it is not allowable to declare in one count upon a demand for which he is liable individually, and in another for a debt due the estate he represents; such a declaration would be objectionable on general demurrer for a misjoinder of counts.—*Jefford's Adm'r* v. *Ringgold & Co*.....544
27. The rescission of a contract, under seal, cannot be given in evidence under the plea of accord and satisfaction; nor can the acceptance of rent from another as tenant, avoid a lease, unless the fact be pleaded specially.—*Barelli & Martin* v. *O'Conner*.....617
28. Where a sheriff justifies the seizure of property under a writ of *fieri facias*, he need not allege that a judgment was rendered in the case in which the execution issued; the production of the judgment may become necessary, where the plaintiff proves that his title is paramount to the lien of the execution.—*Shepherd, et al.* v. *Nabors*.....631
29. Where a creditor on account of his debt, accepts the note of a third person from, and endorsed by his debtor, the creditor, upon its dishonor, is entitled to declare either on the endorsement or for the precedent debt; but in either case he is bound to shew the same degree of diligence.—*Bates* v. *Ryland*. 668
30. The statutory condition that the endorser shall not be liable unless the maker

PLEADINGS—*continued.*

is sued to the first court of the county of his residence, being waived for a specified time, is not revived at the expiration of that time. Afterwards it is only necessary to prosecute the maker to insolvency in order to fix the liability of the indorser....*Ib*.....668

31. A suit against the indorser of a note, not payable in bank, is premature, when the maker has not been prosecuted to insolvency, and when there is no fact which operates as a discharge of the condition....*Ib*.....668

32. If, however, the maker is insolvent, and dies before the holder is by law required to sue him, the creditor is then discharged, and the endorser is directly liable. *Quere*...Whether his death alone does not produce the same consequence. But the death of the maker, after suit brought, will not cure the defect.—*Ib* 668

33. Where the plaintiff demurs to the defendant's plea, and submits his case to the jury, who return a verdict against him, he cannot object, in an appellate court that there was no judgment on his demurrer, or that it should have been sustained....*Kirk, et al. Suttle*.....679

34. A count in case is good, which alleges that the plaintiff delivered to the defendant certain negroes to be hired out by him as auctioneer (upon a reasonable reward.) for twelve months, but to be delivered to the hirer upon his giving good security; and that the defendant did dispose of them to G. W. for that time, for $292, without security; in consequence of which the hire remains unpaid, and is wholly lost, &c....*Blick* v. *Briggs*..... 87

35. The declaration alleges that it was agreed between plaintiff and defendant that the latter would be G. W's surety for the sum of $292, for the hire of certain slaves, if the plaintiff would credit G. W. therefor; that the plaintiff, at defendant's special instance, &c. did give the credit, yet the defendant refused to become his surety; by reason whereof the said sum remains unpaid, and is and will be wholly lost to the plaintiff: *Held*, that the declaration discloses a cause of action, for which case will lie, and that it was not bad, because it did not aver the agreement was in writing.—*Ib*.....687

36. A promise by one, that he will pay the debt of another, if the creditor will state the account, and make affidavit of its correctness, before the Mayor of the city of Philadelphia, is void under the statute of frauds, unless it be in writing.—*Brown* v. *Barnes*. 694

37. The declaration in such a case, need not state that the promise was in writing; it will be sufficient to prove it to be so on the trial.—*Ib*.....694

38. *Quere?*...Where the declaration correctly describes a writing, and is founded on it, if insufficient to support an action, should not the defendant demur; and if the cause is submitted to a jury on the plea of *non assumpsit*, can the writing be excluded, if correctly described, on the ground that it does not tend to establish a legal liability...*Bates* v. *Starr*.....697

39. An unincorporated body of individuals, issuing notes, are liable as partners, and therefore, under the statute of this State, the defence that the defendant had withdrawn from the association before the note sued on was issued, can only be given in evidence under the plea of *non est factum*.—*Montgomery* v. *Elliott, use, &c*.....701

40. Upon a suit on a note payable *on demand*, at a particular place, it is not necessary that the plaintiff should prove a demand at the place before suit

PLEADINGS—*continued.*

brought. It is matter of defence for the defendant, if he was ready at the place, to pay.—*Ib*.....701

41. A plea, asserting that the note sued on was executed by an attorney in fact, constituted by a written power authorising him to sign the name of his principal, so as to become binding, if the payee should give notice to the principal within 30 days next after the execution of the note, and averring that no such notice was given, is equivalent to a plea denying the execution of the note, and may properly be stricken out, unless verified by affidavit.---*Sorelle* v. *Elmes*.....706

42. In a declaration on such a guaranty it is only necessary to set out the single bill with respect to which it was made, the guaranty, according to its terms or according to its legal effect, the facts from which diligence is to be inferred, or the insolvency which renders diligence unnecessary, and a sufficient breach of the contract.--*Nesbit* v. *Bradford*.....747

43. The omission to fill up a blank in the declaration, with a day of the month and year, when the precise date is immaterial, cannot be taken advantage of by general demurrer.--- *Ib*.....747

44. In a suit by two as par ners, it is admissible for the defendant, under the general issue, to prove that the debt sued for is due to one of them, and not to the plaintiffs jointly The statute dispensing with proof of the partnership, unless put in issue by plea in abatement, [Clay's Dig. 324, § 68,] does not apply when the contract is with an individual, and the suit is by a partnership.—*Kenan* v. *Starke and Moore*.....773

45. A bond in which the obligor promises "to pay James W. Camp for the benefit of Alfred Turner," may be declared on as a bond payable to James W. Camp.—*Turner* v. *Eldridge*.....821

46. The meaning of the promise is that it is, for the use of Alfred Turner.—*Ib*821

47. In declaring in an action of debt upon a sheriff's bond, the breach being assigned, that the sheriff made a false return of *nulla bona*, to an execution, at the suit of the plaintiff, it is not necessary to aver that the judgment upon which that execution issued is unsatisfied---*Lucas* v. *The Governor, use, &c* 826

48. A bond executed by the name of Jas. W. will be admitted under a declaration which states the obligor's name to be James W.; the latter will be intended to be the true name, and the former a mere contraction of it.---*Robbins, et al.* v. *The Governor of Alabama, use of*, &c.....839

49. In an action on a sheriff's bond, one of the breaches, that the sheriff had before the return day of the *fi. fa.* settled the same with the defendant therein, discharged him from its payment, and thus made himself liable, &c.: *Held*, that the generality of the breach was such, as to admit evidence to show that the act by which the execution was satisfied, was a conversion of the money to the sheriff's use; if such were the case, no demand need have preceded the institution of the suit, and the sheriff would be chargeable with interest from the time of the conversion, on the amount (saving the cost,) then due on the execution.—*Ib*.....839

50. In a declaration upon a bill single, it is a sufficient excuse for the omission, to make profert, that the defendant wrongfully and illegally obtained possession of it from an attorney of the plaintiff; nor is it necessary in such a case to file an affidavit of the loss of the bill, under our statute.---*Robinson, use, &c.* v. *Curry and Haynee*.....842

PLEADINGS—*continued.*

51. A plea which denies that two of the defendants made and delivered a promissory note with others, whose names appear as joint makers, need not be verified. Such a plea, if true, does not disclose matter which is available as a defence.—*Turner, et al.* v. *Lazarus*.....875
52. The office of the *innuendo* is to explain the allusions to the party intended to be libelled, and if the allusions cannot be rendered certain without other matter, it must be placed on the record, by reference to which, the words complained of, become actionable. Its office is to explain—it does not introduce new matter....*Weir* v. *Hoss* & *Wife*.....881
53. When the *innuendo* explains the meaning of personal pronouns, the truth of the explanation is to be ascertained by the context.—*Ib*.....881
54. When the libel had spoken of the plaintiff as the "Filly horse," and *innuendo* that the plaintiff's wife was meant, held to be correct-- her name being *Hoss*....*Ib* 881
55. It is not necessary to set out the entire publication charged as being libellous; unless, by the omission of some portions, a new arrangement is produced, and the sense altered. The proper mode is to show that the selected parts are extracts; and if the part omitted explains it, or renders it harmless, the defendant may have the benefit of it on the general issue.—*Ib*.....881
56. When the plaintiff does not undertake to set out the libel in *hæc verba*, or according to its tenor, the omission or alteration of a letter, which does not alter the meaning, will not be a variance.—*Ib*.....881
57. The declaration alleged that the defendant's intestate, as a member of the firm of A L & Co., which was continued for the purposes of liquidation, but in other respects was dissolved, made a promissory note in their name, for the payment of a pre-existing debt of the firm, to the plaintiff: *Held*, that it could not be intended from the declaration, that the firm were liable to the payment of the note, but it imposed an individual responsibility upon the intestate, for which his administrator was suable. --*Fontaine & Freeman, use, &c.* v. *Lee's Adm'rs*.....889
58. The notice issued at the suit of a Bank requiring its debtor to answer to an allegation of indebtedness, is process to bring the latter into court; but after the motion for judgment has been submitted, it may be regarded as a motion in writing, identifying the debt, to which the defendant may either demur or plead to issue.----*Griffin* v. *The Bank of the State of Alabama*. 908
59. Where a notice of a motion for judgment in favor of a Bank states the time when the note was discounted, so as to show that it was before it bears date, this statement, as it is unnecessary, may be treated as surplusage.----*Ib.* 908
60. A defendant cannot object on demurrer that he is not regularly before the court; if such an objection be available, he must plead in abatement.---*Ib.* 908
61. The plea of *non assumpsit* to a notice of a motion for judgment at the suit of the Bank, throws upon the plaintiff the *onus* of proving the material facts stated in the notice; and if the note sought to be recovered is misdescribed as to the time of its maturity, the variance will be fatal to the motion.---*Ib.* 908

See Abatement, 4.

See Contract, 8.

See Error, Writ of, 9, 10, 11.

See Infant and Infancy, 1.

PLEADINGS—*continued.*

See Practice at Law, 9, 10, 11.

See Section Sixteen, 5.

See Statutes, 10.

POINTS REFERRED, AS NOVEL AND DIFFICULT.

1. The Circuit Court cannot refer to the Supreme Court, as novel and difficult, a question of law arising in a criminal case, until it has rendered judgment therein. —*The State* v. *Harkins*. 57

PRACTICE AT LAW.

1. A defendant will not be permitted, in an appellate court, to raise a question of jurisciction, by showing a fact, by affidavits, when the same matter is not disclosed by the record.—*Powers* v. *David*.....9
2. If there is a general verdict that the defendant is guilty of an unlawful detainer, and the judgment is "according to the verdict," both will be referred to the complaint, which, if sufficient in the description of the lands, and of the offence, will sustain the judgment —*Ib*.....9
3. An order cannot be made in vacation, at the instance of a stranger to the judgment, to arrest the execution of a writ of *habere facias possessionem*, although after its execution, if improperly turned out of possession, he may, in certain cases, on motion to the court, be restored to the possession.—*Hall* v. *Hilliard*.....43
4. When the record discloses that a cause has been in court for three years, and has once been continued by consent, the judgment will not be reversed, although no service or writ appears in the transcript, and although the appearance of the defendant's attorneys is, on their motion, stricken out. The proper course, if there was no service or waiver, was for the defendant to explain the condition of the record, by affidavit, and ask its correction.—*Ethridge* v. *Fuller*.....58
5. A suit should not be dismissed for the omission of the plaintiff to give security for the costs, pursuant to a notice, if the plaintiff gives sufficient security at the next term of the court.—*Lyons* v. *Long*. 103
6. When judgment is rendered for the defendant, on a demurrer to a plea in abatement, it is error if the court refuse to permit the plaintiff to take issue on the facts of the plea.----*Chilton* & *Bowdon* v. *Harbin*.....171
7. The irregular execution of a *fi fa.* may be corrected, or avoided by a seasonable application to the court from which it issued.---*Hubbert, et al.* v. *McCollum*. 221
8. Interrogatories, filed pursuant to the act of 1837, in order to obtain the plaintiff's testimony, may be served either on the plaintiff, *or his attorney;* and if not answered, the suit may be dismissed, or continued, with the view of obtaining answers.—*Jackson* v. *Hughes*.....257
9. Where the defendant goes to trial without objecting that there was no replication to a special plea, he cannot be allowed to make the objection on error. ----*Hubbert* v. *Collier, by his next friend, &c.* 269
10. It cannot be objected, on error, that the declaration on which an issue has been tried, was entitled of an improper term.----*Ib.* 269
11. After a verdict, in an action of trespass, the defendant cannot object to the declaration, that it alleges the trespass to have been committed on a certain month, without particularizing the day.----*Ib.* 269

PRACTICE AT LAW—*continued.*

12. The plaintiff may, on the trial, abandon such of the assignments of breaches as he thinks proper, even after a demurrer to them has been overruled.----*Hill, et als.* v. *Fitzpatrick, Governor, use, &c.*.....314

13. Where defendants, sued as executors, plead *ne unques executors*, it is enough for the plaintiff to show, on the trial of the issue, that they had received letters testamentary under a grant thereof by the county court, in order to throw upon the defendants the *onus* of sustaining their plea.---*Tarver's ex'rs* v. *Boykin.* 353

14. The judgment entry recites that the parties came "by their attornies, and the defendant suggests that the plaintiffs have resigned as administrators, of, &c., which fact being proved to the satisfaction of the court, and the defendant withdrawing his plea, says nothing in bar or preclusion of the plaintiff's demand. It is therefore considered. &c." *Held*, that it could not be inferred from the defendant's suggestion that the plaintiffs had resigned the administration; the fact not being admitted by them, it should have been asserted by plea regularly interposed, and tried by the jury, and the court was not competent to determine it upon hearing the evidence.—*Winslett* v *McLemore's Adm'rs* 416

15. Under the statute authorising discoveries in suits at law, it is with the party exhibiting the interrogatories to elect whether he will have the adverse party attached and compelled to answer, or continue the cause, or when the defendant is required to answer, to have him defaulted for a failure to answer within sixty days after service.---*Goodwin, use of Hale, adm'r, &c.* v. *Harrison.* 438

16. It is discretionary with the court to set aside a default entered upon a failure to answer in such a case, but this discretion ought not to be exercised, unless a satisfactory reason is shown for the failure to answer, and the showing in all cases where practicable, should be accompanied by full and explicit answers...*Ib.* 438

17. The recital in the record, that the jury were duly sworn well and truly to inquire of said forcible and unlawful detainer, is sufficient, without stating that they were sworn to try the cause according to the evidence.---*McRae* v. *Tilman.* 487

18. When the judgment of the justice is reversed by the circuit court, because the lands are not sufficiently described in the complaint, the cause should be remanded for the purpose of amendment.---*Ib.* 487

19. Where the transcript of the record shows a consent by the defendant, endorsed on the writ, to waive the declaration, and that the endorsement of the cause of action shall be used in place of it, a judgment by default will not be reversed because this consent does not appear from the record to have been proved to the court below. The proper course, if no such consent was given, is to apply to the court below to vacate the entry of consent and thus make the record in accordance with the fact.---*Humphreys' adm'r* v. *Thompson.* 649

20. *Quere?*—Where the declaration correctly describes a writing, and is founded on it, if insufficient to support an action, should not the defendant demur; and if the cause is submitted to a jury on the plea of *non assumpsit*, can the writing be excluded, if correctly described, on the ground that it does not tend to establish a legal liability.----*Bates* v. *Starr.* 697

21. Where a declaration contains several counts, to one of which a demurrer is sustained, and on the others issues are tried, and verdict and judgment thereon for the plaintiff; if the demurrer was improperly sustained, the judgment will be reversed *in toto*, and not merely as to the count adjudged to be defective.—*Fontaine & Freeman, use, &c.* v. *Lee's Admrs*.....889

PRACTICE AT LAW—*continued.*

See Amendment, 1.
See Appeals and Certiorari, 3, 4.
See Chancery, 19.
See Deposition, 4, 5.
See Discontinuance, 1.
See Error, Writ of, 16.
See Garnishment and Garnishee, 2, 10.
See Judgment and Decree, 10, 17.
See Jury, 1.
See Pleadings, 50.
See Right of Property, Trial of, 1, 2.
See Scire Facias, 1.
See Verdict, 2.
See Witness, 1.

PRACTICE IN CHANCERY.

1. When a bill is filed to restrain a suit at law, on grounds of defence which could be available at law, if sustained by sufficient evidence, and it is alleged in the bill that the facts constituting this defence can only be established by evidence from the defendants to the bill;—this is a bill for discovery merely, and on the coming in of the answer of the defendant, denying the equity, it is proper for the chancellor to dismiss the bill when he dissolves the injunction.—*Steele* v. *Lowry and M'Ghee.* 124

2. When the decree of a chancellor ascertains and settles the rights of the parties in litigation, it is so far *final* as to sustain a writ of error, although the chancellor may refer the cause to a master to ascertain facts for an account. It will not vary the case that proceedings were afterwards had, and new parties made for a purpose not affecting the merits, but relating merely to the account to be taken.—*The Bank of Mobile* v. *Hall*.....141

3. A final decree which will bar the prosecution of a writ of error, after three years, is the last decree made in the cause.—*Ib.* 141

4. The object of the rule stated in Clay's Dig. 615 § 26, is to do away the necessity for filing a supplemental bill, when a necessary party is omitted in an original bill for the foreclosure and sale of a mortgaged estate; and it allows the introduction of a new party after the decree and sale.—*Glidden* v. *Andrews.* 190

5. The proper course of practice, under this rule, is to file the petition, upon which an order goes, that the person named be made a party to the original bill, and process is awarded to bring him before the court. A re-sale of the mortgaged premises is not necessary, unless the new defendant insists on one by his answer.—*Ib.* 190

6. When, under this rule, process has issued requiring the new party to answer the petition, and no process being issued on the bill against him, no decree can be rendered, as process upon the petition is a useless act, and will not warrant a decree.—*Ib.* 190

7. The statute empowering courts of equity to proceed against absent defendants, invests those courts with jurisdiction over bills for discovery, in aid of the

PRACTICE IN CHANCERY—*continued.*

prosecution, or defence of a suit pending in any of the courts of law of this State, or with respect to property within it.—*Arnold* v. *Sheppard*.....299

8. It is not necessary in suits against absent defendants to prove the allegations of the bill, when it is taken *pro confesso*. The enactment which requires proof, only applies to suits against resident defendants.—*Ib*.....299

9. As a general rule, the court of chancery should not direct an issue to be tried at law, unless the evidence is so conflicting as to make it difficult to attain any certain conclusion; but the statute appears to make the case of a bill filed to set aside a will, an exception to the general rule, and to give the chancellor the power to direct an issue whenever he thinks proper.----*Johnston, adm'r et al.* v. *The heirs of Hainesworth*..... 443

10. *Devisavit vel non* is an issue in fact.----*Ib*.....443

11. An issue out of chancery ought not to be directed until the answers are in, and the testimony taken.—*Ib*. 443

12. Infant defendants must be served with process, and the rules adopted in 1841 did not materially change the law in this respect.—*Ib*.....444

13. Objections to the time of making a party must be made in the court below, or they cannot be raised in the appellate court.—*Ib*.....444

14. If the mortgagee has indorsed the notes and assigned the mortgage by which they were intended to be secured, he is not *prima facie* a necessary party to a bill brought for a foreclosure; and a bill which makes his heirs parties, must show their interest by proper allegations, and should contain a prayer for relief and process against them.—*Walker, et al.* v. *The Bank of Mobile*.....452

15. Non-resident defendants, who are infants, must be notified by publication, &c. as if they were adults, and until this is done, the appointment of a guardian, *ad litem*, is irregular....*Ib*. 452

16. A court of chancery may rescind an order appointing a guardian *ad litem*, made pending a cause there, where another person had been previously appointed, who filed an answer for the infants....*Ib*. 452

17 The act 1805, which provides that before a decree shall be rendered against a non-resident defendant, the complainant shall execute a bond for his indemnity, if he should appear and petition for a re hearing, impliedly requires that the bond should be made payable to all the defendants, (where there are several) who are non-residents.....*Ib*.....452

18. A prior or subsequent incumbrancer, although a proper, is not an indispensable party to a bill for the foreclosure of a mortgage....*Ib*.....452

19. Where infants are defendants to a bill of foreclosure, the master should ascertain and report whether it was for their interest to sell the mortgaged property in separate lots, whether a division can be conveniently made, and which parcel their interest requires should be sold: *Further*, that he should report such a statement of the evidence as would enable the court to judge of the justness of his conclusions, if questioned.—*Ib*. 452

20 When the sureties of a sheriff, against whom a judgment, on motion, has been rendered, have filed their bill putting either the *factum* or legal sufficiency of the bond in issue, the injunction should be retained until the determination of the issue, or until the production of a record, by which the questions at issue are concluded....*M'Clure. et al.* v. *Colclough, et al.* 492

PRACTICE IN CHANCERY— *continued.*

21. *Semble:* Where the complainant could obtain the relief to which he is entitled, without a resort to equity, the defendant will not be taxed with costs.—*Langdon, et al.* v. *Roane's Adm'r*. 518

22. Although it cannot be demanded as a right, the chancellor may, in his discretion, at any time before the decree, permit a formal amendment to be made to the bill. An amendment relating to the price alleged to be given for lands, when it can be considered a clerical mistake, is of that character.—*Cummings' heirs, et al.* v. *Gill's heirs*.....562

23. No decree, except for costs, can be made in favor of a defendant upon his answer. If he seeks relief he must do it by a bill of his own.—*Ib*.....562

24. *Semble:* where a bill is defective for uncertainty, but the objection was not made in the primary court, an appellate court, in reversing the decree, will direct each party to pay his own costs.—*Hartwell and Wilkins* v. *Blocker*. 581

See Chancery, 9, 10, 22.

PRINCIPAL AND AGENT.

1. Where one purchases goods of a factor, under a belief authorised by the facts of the case, that the latter was the real owner, he may set-off a debt due him from the factor, to an action for the purchase money, brought either by the factor or his principal.—*Gardner & Sager* v. *Allen's ex'r*. 187

2. The corporation is not liable for the acts of its marshal, unless done by its direction.—*Ready and Banks, ex'rs*, v. *The Mayor and Ald. of Tuskaloosa*. 328

3. A factor, to whom goods are consigned for sale, is entitled to a lien upon them and their proceeds, for advances, and commissions consequent upon their reception, safe-keeping and sale, and for what may be due him upon *a general balance of accounts growing out of similar dealings*...*Martin* v. *Pope & Son*.....532

4. Where a factor makes advances, in the absence of a special agreement, the inference is, that they were made upon the joint credit of the personal security of the principal, and of his goods and money that may come to hand; and he may renounce his lien without affecting his remedy against the person, and *vice versa*.—*Ib*. 532

5. Where a factor sells goods, and appropriates the proceeds to his account against the principal without objection by the latter, the surety of the principal for the payment of a demand of equal dignity to the factor, when sued by the latter, cannot object that the appropriation was not so made as first to relieve him from liabitity...*Ib*. 533

6. A factor credited his principal with the proceeds of goods sold, afterwards paid him a part thereof, then sold for him other goods to a much greater amount: *Held*, that a surety of the principal, in an action by the factor, could not claim a deduction from his liability for the sum credited and afterwards paid over...*Ib* 533

7. An agent acting for a known principal, and receiving money in that character, is not individually responsible if the money has been paid over to his principal without notice. Therefore, when a county clerk collects money by order of the commissioners' court, he cannot refuse to pay it over to the county treasurer, although it has been illegally assessed, unless it had been previously demanded of him by those from whom it was received....*Thompson* v. *Stickney*. 579

PRINCIPAL AND AGENT—*continued.*

See Lien, 6.

See Promise, 1.

PRINCIPAL AND SURETY.

1. The relation of principal and surety continues, even after the rendition of a judgment against them, so as to entitle the latter to insist upon his discharge when without his consent, the creditor agreed to indulge the former upon a sufficient consideration.—*Carpenter* v. *Devon, et al.* 718

PROCEES, AND SERVICE OF.

1. Where process is directed to and executed by the coroner, which does not affirm the incompetency of the sheriff to act, its irregularity cannot be objected to on error after a judgment by default; but if it was improperly directed, the fact should have been pleaded in abatement.—*Sawyer. et al.* v. *Price*.....285
2. A garnishee who acknowledges the service of a garnishment regularly issued, and answers the same, cannot object on error that the process was not executed by the sheriff, or proper officer.—*Daniel. et al. &c.* v. *Hopper*.....296
3. Where process against a corporation is returned as served upon one being president of the corporation, it is necessary that proof of his official character should be made to the court, and so appear on the record, to sustain a judgment by default.—*Wetumpka and Coosa R. R. Company* v. *Cole*.....655
4. An attorney entered an appearance for the defendant, but when the cause was transferred to the trial docket, erased his name, writing thereon the word "mistake:" Held, that as the defendant had not been served with process, a judgment by *nil dicit*, or default, could not be rendered against him.—*Foreman* v. *Lay, surviving partner, &c*.....784

See Attachment, 8.

PROMISE.

1. A son wrote to the creditors of his father, promising to pay a debt his father owed, stating that his father had made provision for it, and concluded by saying "I am the agent for the trustees, and am determined the debt shall be paid forthwith." *Held*, that this was not an absolute promise to pay the debts. That if he was responsible upon the promise, it was in his character of agent, when the question would be whether he had authority from the trustees to make the promise.—*Steele* v. *Dart & Co*.....798

See Bankrupt and Bankruptcy, 1.

See Infant and Infancy, 3, 4.

See Pleadings, 45, 46.

PUBLIC LANDS.

1. Boards, rails and bricks, cut and made from the soil of land belonging to the United States, and appropriated by the maker, do not pass to one who subsequently purchases the land from the United States, although the severed chattels are remaining on it; and the maker may maintain trover for their conversion by the person who thus becomes the owner of the land, he showing no connexion between himself and the United States with respect to the severed chattels.—*Carpenter, et al.* v. *Lewis, et al*.....682

RECOGNIZANCE.

1. W. enters into a recognizance with H. and as his surety, for his appearance at the next term of a Circuit court, to be held on the 4th Monday of March. Subsequently, the time of holding the court is changed to the first Monday in March, when the recognizance is estreated. *Held*, that the legal effect of the recognizance is to appear at the next court, and that it is not avoided by the change in the time of holding the court.--*Walker. et al.* v. *The State*.....350
2. Where recognizors are bound in several sums in one recognizance, and several judgments are rendered against them, they cannot join in the prosecution of a writ of error; but where a joint writ is sued out by them, it may be amended under the act of 1843 "to authorize the amendments of writs of error," by striking out one of their names, and then it will remove the cause as to the other.—*Farr & Simpson* v. *The State*.....794
3. The judgment upon a recognizance should show that the party charged with an offence, was required to answer the charge specified therein.—*Ib* 795

RENT.

1. Upon the forfeiture of a mortgage, the mortgagee becomes not only entitled to the possession of the mortgaged premises, but also to the rent then in arrear and unpaid, upon notice to the tenant in possession.---- *Coker* v. *Pearsall*. .... .542

RETAILING AND RETAILERS.

1. Although the charter of the city of Mongomery provides that retailers who procure a licence from the city council shall be exonerated from paying any thing to the county for the privilege of retailing in the city, yet it does not relieve them from the necessity of obtaining a licence from the county court as required by the acts of 1835 and 1839.—*The State* v. *Estabrook*.....653
2. An act incorporating a town, authorised the enactment of by-laws "to restrain and prohibit every species of gambling, drunkenness, &c.; to grant licences to the retailers of spirits and liquors; to regulate and restrain them when deemed a nuisance;" and to pass all such by-laws consistent with the constitution and laws of this State, as may be necessary, &c. Under this grant of power, the corporation passed an ordinance prohibiting the retailing of spirituous or fermented liquors within the corporate limits, without first paying to its treasurer the sum of one thousand dollars for a license for one year; and for retailing without such licence, a penalty of ten dollars a day was imposed, and made recoverable by warrant before the intendant, &c.: *Held*, that this by-law was authorized by the act of incorporation.---*The Intendant and Council of the the town of Marion* v. *Chandler*.....899

RIGHT OF PROPERTY, TRIAL OF.

1. Upon the trial of the right of property, the issue being, that *the property levied on was, at the time of the levy, subject to the satisfaction of the execution*; it is not admissible to show, by parol, that the invalidity of the mortgage, under which the claimant deduced his title, was submitted to the jury.---*Davidson & Stringfellow* v. *Shipman, et als*.....27
2. Such an issue is an immaterial one, and no judgment should be rendered on the finding of the jury, but the court should award a re-pleader.—*Ib*.....27
3. Where the affidavit of the claimant of property levied on by execution, describes the execution, the property levied on, and when, and asserts that the right thereto is in the claimant, this is a sufficient compliance with the statute, although

RIGHT OF PROPERTY, TRIAL OF—*continued.*

the affidavit is dated on the day the sheriff's indorsement shows the execution was placed in his hands, and four days before the same was levied ---*Rives & Owen* v. *Wilborne* 45

4. Where personal property is levied on by attachment, and a replevy bond executed, conditioned to have the same forthcoming to abide such judgment as may be rendered in the cause, the property cannot be levied on by an execution, the lien of which is not paramount, until it is discharged from all liability to satisfy the attachment on the judgment therein.---*Ib*.....46

5. In a claim to property levied on, where the deed under which the claimant makes title, is set out in his plea, and the replication is, that if any such deed exists, it is not valid in law; such a replication, in a claim cause, does not admit the execution of, or dispense with proof of the deed..–*Desha, Sheppard & Co.* v. *Scales*.....356

See Jurisdiction, 1.

SALES UNDER ORDER OF COURT.

1. When lands are subjected to sale at the suit of an administrator, under the act of 1822, and a conveyance is made to the purchaser by the administrator, but there is no final decree by which he has been directed to convey the title, the title of the heirs at law, is not divested.—*Bonner* v. *Greenlee's heirs*.....411

2. *Quere.* If, under the act of 1822, the administrator is appointed sole commissioner to conduct the sale, and does so, and afterwards makes a report, setting out the sale and conveyance by him, and the judge of the county court endorsed the report, as approved by him, and orders it to be filed and recorded among the papers of the estate, is this order a final decree, or will it furnish evidence to warrant a decree *nunc pro tunc?*—*Ib*.....411

3. An executor or administrator having an interest in the estate may purchase at his own sale, provided it is fairly conducted; if not, it may be set aside by creditors or legatees, but is not a nullity.—*McLane* v. *Spence. Adm'r*.....894

4. S being administrator of the estates of K and C, elected to consider certain slaves, which C, being the former representative of the estate of K, had purchased at his own sale, as the property of the estate of K, by hiring them out, as such, and in various other modes. The slaves having been sold under execution against the estate of K, S brought an action against the officer for a trespass upon the estate of C: *Held*, that as he had elected to consider the slaves as the property of the estate of K, he could not afterwards insist they were the property of C, as he had merely done what a court of chancery would have directed, if application had been made to it to set aside the purchase made by C.---*Ib*.....894

SCIRE FACIAS.

1. A *scire facias* calling on the defendant to show cause why the plaintiff, as administrator, should not have execution on a judgment which had been superseded by a writ of error bond, and affirmed in the Supreme Court, must issue out of the court which rendered the judgment so affirmed, and not out of the Supreme Court.—*Barron, Adm'r* v. *Pagles et al*.....422

See Pleadings, 22.

SECTION SIXTEEN.

1. It is not essential that an election to ascertain the sense of the township, as to a sale of the 16th section, should be held *upon* the 16th section,—the commissioners may consult the convenience of the people, by holding it at another place.—*Tankersly, et al.* v. *The State Bank*.....277
2. Where there has been an election in fact, to ascertain the sense of the qualified electors as to a sale of the 16th section, which is not contested within twenty days, and a sale of the land is actually made, all persons are concluded in a court of law, from contesting the validity of the election:—Whether in a case of fraud, on the part of the commissioners, a court of equity might not interfere at the instance of the township—*Quere.*—*Ib*.....277
3. It is not essential to the validity of a sale of a 16th section, that the judge of the county court should issue an order of sale. Nor that the commissioners should return the particulars of the sale to the county court.—*Ib*.....277
4. The certificate of purchase which the commissioners were required to give the purchaser, setting forth the particulars of the sale, was intended exclusively for his benefit, and if defective, will not vacate the sale,—nor will an omission to acknowledge it before a judicial officer, or a defective acknowledgment, affect the rights of the township.—*Ib*.....277
5. A statute provided that where a sale has been made of a sixteenth section, or a part thereof, which cannot by reason of the insolvency of the purchaser, or other cause, be made productive, a majority of the voters of the township, voting in township meeting, upon due notice given, shall have power, with the assent of the purchaser, to annul or cancel the contract of sale; *Held*, that a plea alleging that a majority of the voters of the township voting in township meeting, upon due notice given, did, with the assent of the purchaser, annul and cancel the contract of sale, because the same could not be made productive, was good, although it did not state the particular reason which induced the voters to assent to a rescission...*Lewis, et al.* v. *B. Bank at Montgomery* 496
6. Although the act of 1837 enacts that "The trustee of each school district, and where the township supports but one school, the commissioners shall have power to employ a teacher, &c.," yet a person employed by the commissioners need not allege or prove that there is but one school supported by the township; if the fact be otherwise, and it can avail the commissioners, they must show it....*Commissioners of section sixteen* v. *Criswell*.....565

See Contract, 8.

SET-OFF.

1. Where a promissory note, payable either in a bank of this or some other State is indorsed before maturity, under the act of 1828, a set-off is not admissible to an action brought thereon by a *bona fide* indorsee ---*Beal & Bennett* v. *Wainwright, Shields & Company*.....156
2. Where one purchases goods of a factor, under a belief authorised by the facts of the case, that the latter was the real owner, he may set-off a debt due him from the factor, to an action for the purchase money, brought either by the factor or his principal.—*Gardner & Sager* v. *Allen's Ex'r*.....187
3. A debt due from a bankrupt, and other persons as partners, may be set-off against a demand due to the bankrupt individually, although the suit is in the name of the bankrupt's assignee.—*Bean* v. *Cabbaness*.....343

SET-OFF—*continued.*

4. No offset can be made of a personal debt, due from the administrator against a contract made with him, which will be assets of the estate...*Harbin* v. *Levi* 399
5. P. and W. are the joint makers of a note to one J. W., who assigns it to M., but previous to any notice to the payees of the assignment, P. one of them, acquired a note made by J. W., payable to one J P., and by him assigned to P. *Held*, in a suit on the note by M. against W., that the latter was entitled to the benefit of the set-off held by his co-maker P. against J. W., on prodecing the note at the trial, with the consent of P, to use it as a set-off.—*Winston* v. *Metcalf* 756
6. A judgment on a note executed by the defendent and the plaintiff, as the join sureties of a third person, is proper evidence under a plea of set-off, as laying the foundation to prove the payment of money at the plaintiff's instance.—*Cave, use of Wallace*, v. *Burns*.....780
7. A judgment may be pleaded as a set-off, and if larger in amount than the debt sued for, a finding of the issue in favor of the defendant, will extinguish so much of the judgment as is necessary to satisfy the debt...*Jones* v. *Melton* 830
8. When a plaintiff's note is offered under a general plea of payment or set-off, it is necessary to prove its execution, otherwise it may properly be rejected. *Taylar* v. *Morgan*.....893

See Evidence, 42.

SHERIFF AND SURETIES.

1. Upon a suggestion against the sheriff, under the statute, a plaintiff in execution cannot recover more than the value of the effects of the defendant liable to execution.—*Gary, et al.* v. *Hathaway*.....161
2. Whether a court of chancery could afford relief, and apportion the fund, when several plaintiffs have, by their several judgment, recovered of the sheriff a sum beyond the value of the property of the defendant subject to sale by execution—*Quere*—*Ib* 161
3. In a proceeding before the judge of the county court, by a surety of a sheriff, to compel him to execute a "new bond," every fact must appear upon the record which is necessary to give the court jurisdiction —*Caskey, Sheriff*, &c. v. *The State* 193
4. It is therefore necessary that the name of the surety, requiring another bond to be executed, should be stated in the citation—that a particular day should be set for the execution of such "new bond;" and that the judgment of the county court, vacating the office of the sheriff, should state that the sheriff neglected or refused to give such new bond with good and sufficient surety.—*Ib* 193
5. Where a motion for judgment was made against the sheriff and his sureties, upon a suggestion, that with due diligence, the former might have made the amount of an execution, it appeared that the sheriff had collected the greater part of the execution before its return day, and the residue afterwards: *Held*, that as to the money collected, before the execution was returnable, the sheriff was not chargeable with neglect, and the plaintiff was not entitled to judgment against him and his sureties, in a summary proceeding under the statute.—*Robertson* v. *Locke, et al.*.....246
6. The omission, in a notice to a sheriff, of a rule for failing to pay over monies collected on an execution, to state a *day certain* upon which the money was

SHERIFF AND SURETIES—*continued.*

demanded from him, is not an error which can be reached by demurrer. It is sufficient if the notice shows the demand was made after the collection, and before the notice.—*Price, et al.* v. *Cloud*.....248

7. Pleas to a motion against a sheriff and his sureties, for failing to pay over money collected on an execution, are bad, when they assume a return of satisfaction, and assert that the return is is a mistake.—*Ib*.....249

8. Any plea *by a surety*, in such a case, is bad, which attempts to deny the liability of the principal on behalf and in the name of the surety. When the sheriff is a party, the defence, with respect to his liability, must be carried on in his name.-*Ib*.....249

9. When there is a return of satisfaction to an execution, it is not competent for sureties of the sheriff to show, as a defence, that no money was paid to the sheriff, but that the satisfaction was entered on account of property received, until the return is set aside. Whether it would be set aside, on a proper showing. *Quere*—*Ib*.....249

10. When there is a return of satisfaction, by the sheriff, it is unnecessary, in a motion against sureties, who became so previous to the return day, to shew any thing more than the return, and a demand of the money.—*Ib*.....249

11. In an action against a sheriff and sureties, on his bond, it is not necessary to allege a demand *specially*. The case of McBroom v. The Governor, [6 Porter 32,] *contra*, overruled.—*Hill, et als.* v. *Fitpatrick, Gov. use, &c*.....314

12. In a suit against the sheriff and his sureties on his bond, the latter cannot insist that they are not liable upon the bond described in the declaration, but upon one executed subsequently, unless they put the fact in issue by plea.—*Ib*.....314

13. In such an action it is not necessary to produce the judgment on which the execution issued, its recital in the execution is *prima facie* evidence of the fact against the sheriff.—*Ib*.....314

14. A sheriff who has collected money upon an execution, cannot dispute the right of the plaintiff to the money, upon the ground that the judgment was satisfied by a recovery and satisfaction in another case, founded upon the same cause of action.—*Ib*.....314

15. A deputy sheriff invested by his principal with the power to collect money under execution, and actually collecting it, cannot refuse to pay it over without putting his principal in default; a demand therefore, of him, is, in law, a demand of the principal. It will not vary the case that the sheriff's office has been declared vacant as he has the power to finish the business which he had begun.—*Ib* 314

16. A sheriff who takes insufficient security upon a forth-coming bond, cannot be proceeded against by motion, but the party aggrieved thereby must seek redress, by action at common law.—*Gary* v. *McCown*.....370

17. A notice against a defaulting sheriff or constable, is sufficient, if it specifies the term at which the motion is made.—*Welch, et als.* v. *Fourier*.....516

18. In declaring in an action of debt upon a sheriff's bond, the breach being assigned, that the sheriff made a false return of *nulla bona*, to an execution, at the suit of the plaintiff, it is not necessary to aver that the judgment upon upon which that execution issued is unsatisfied .*Lucas* v. *The Gov. use*, &c. 826

19. A recovery in an action against the sheriff for a false return, is no evidence to fix the liability of his sureties, when they are sued upon his official bond..*Ib* 826

SHERIFF AND SURETIES—*continued.*

20. *Semble:* Where a sheriff collects the amount of an execution, by receiving property, or in some other irregular manner, and accepts it as a satisfaction from the defendant, if the plaintiff elect so to consider it, the sheriff cannot object, in an action on his bond, that the execution was not paid with the money.—*Robbins, et al.* v. *The Governor of Alabama, use, &c.*.....839

See Action, 2.

See Chancery, 17, 18, 19.

See Evidence, 6, 7, 8, 26.

See Execution, Writ of, 5, 14.

See Frauds, Statute of, 2, 3.

See Pleading, 3, 4, 5, 28, 49.

See Summary Proceedings, 2.

STATUTES.

1. A deed, by which personal property is conveyed to trustees for the use of an infant child, is not a mortgage, deed of trust, or legal incumbrance, within the meaning of the act of 1823, "To prevent fraudulent conveyances;" and does not become liable to the debts of the party in possession, although the deed has not been recorded.—*Thomas and Howard, Trustees, &c.* v. *Davis.* 113
2. The act of 1833, which requires the officer taking a bond on the levy of an attachment, in the event of its condition being forfeited, to indorse the fact on the bond, is not so imperative in its requirements, as to subject the officer to a judgment on motion, unless he was informed that a bond was taken and lodged in the clerk's office; and even after such information given, he will be allowed a reasonable time to make the indorsement.—*McGee* v. *Childers*.....196
3. By the act of 1843, to regulate the expences of the county of Mobile, certificates of State witnesses are to be paid out of the fund in the treasury, arising from fines and forfeitures.—*Cuthbert, et als.* v. *Lewis*.....262
4. The decision of the commissioners, appointed under the 12th section of the act of 1843, that a claim against the county, is valid, is conclusive upon the county.—*Ib* 262
5. The act of the Legislature, incorporating the Planters' and Merchants' Bank, is a public statute, and will be noticed judicially by the courts, though not specially pleaded.—*Crawford, et als.* v. *Pl. and Merchants Bank of Mobile* 289
6. The act of 13th February, 1843, for the settlement of the affairs of the Planters' and Merchants' Bank continues the charter of the Bank in existence, for the purpose of maintaining suits whether commenced before or after the charter was *declared forfeited*....*Ib* 290
7. Under the statute authorising discoveries in suits at law, it is with the party exhibiting the interrogatories to elect whether he will have the adverse party attached and compelled to answer, or continue the cause, or when the defendant is required to answer, to have him defaulted for a failure to answer within sixty days after service.—*Goodwin, use &c.* v. *Harrison.* 438
8. The act of 1805, which provides that before a decree shall be rendered against a non resident defendant, the complainant shall execute a bond for his indemnity, if he should appear and petition for a re-hearing, impliedly requires

STATUTES—*continued.*

that the bond should be made payable to all the defendants, (where there are several) who are non-residents—*Walker, et al.* v. *The Bank of Mobile* 452

9. The act of 1833, which authorises an officer levying an attachment, to require the plaintiff therein to execute a bond for his indemnity, should it afterwards appear that the property levied on does not belong to the defendant, does not give to the obligee a summary remedy on the bond; and the statutes of 1807 and 1827, in respect to bonds given upon the levy of an execution, cannot, by construction, apply to the case.—*Mansony and McLosky* v. *Toulmin* 474

10. A statute provided that where a sale has been made of a sixteenth section, or a part thereof, which cannot by reason of the insolvency of the purchaser, or other cause, be made productive, a majority of the voters of the township, voting in township meeting, upon due notice given, shall have power, with the assent of the purchaser, to annul or cancel the contract of sale: *Held*, that a plea alleging that a majority of the voters of the township voting in township meeting, upon due notice given, did, with the assent of the purchaser, annul and cancel the contract of sale, because the same could not be made productive, was good, although it did not state the particular reason which induced the voters to assent to a rescission. *Lewis, et al* v. *Br. Bank at Montgomery* 496

11. The term of the county court of Tuskaloosa county, held on the 2d Monday of December, 1843, was authorised by the act of the 13th February, 1843.—*Ex parte Bank of the State of Alabama* 498

12. The judge of the county court of Tuskaloosa county, under the act of the 13th Feb. 1843, is authorised to tax a fee of two dollars on bank suits, although no jury trial is had.—*Ib.* 498

13. Although the act of 1837 enacts that "The trustees of each school district, and where the township supports but one school, the commissioners shall have power to employ a teacher, &c." yet a person employed by the commissioners need not allege or prove that there is but one school supported by the township; if the fact be otherwise, and it can avail the commissioners, they must show it.—*Commissioners of section sixteen, &c.* v. *Criswell* 565

See Appeals and Certiorari, 7.

See Attachment, 10, 11.

See Bank, 7.

See Contract, 1.

See Court, Commissioners of Roads and Revenue, 2.

See County Tax, 2.

See Criminal Cases, and Proceedings in, 3, 14, 15, 16.

See Deposition, 4, 5.

See Error, Writ of, 21.

See Evidence, 43, 52.

See Execution, Writ of, 15.

See Executors and Administrators, 9, 10.

See Garnishment and Garnishee, 11.

See Indictment, 1, 2, 7.

See Land Titles, 1.

STATUTES—*continued.*

See Landlord and Tenant, 3, 4.

See Partners and Partnership, 7.

See Pleadings, 44.

See Recognizance, 2.

See Retailers, 1.

See Section Sixteen, 1, 2, 3, 4.

See Usury, 1.

STOCK, SUBSCRIPTION FOR, &C.

1. The opinion of one of the commissioners appointed by an act of incorporation to receive subscriptions for stock, that a subscriber might forfeit his stock by failing to pay an assessment thereon, can have no influence upon the liability of the latter; and in an action brought for the recovery of an assessment is irrelevant testimony. .*Hall* v. *The Selma and Tennessee Railroad Company.* 741
2. In an action against a stockholder for his subscription, he cannot object that the directors of the company had released other stockholders; if the release was under a power it would be valid, if otherwise merely void...*Ib* 742
3. Where the charter of a company appoints commissioners and directs books of subscription to be opened at certain places, but also directs that upon default of payment of stockholders, their stock shall be sold, and books opened to supply the deficiency; a subscriber under this latter provision cannot object to pay for his stock, because he subsbribed for the same at a place where the books were not required to be originally opened...*Ib*.....742
4. Where an act of incorporation requires five *per cent.* upon stock to be paid at the time of subscription, if the subscriber does not then pay it, but a judgment is afterwards rendered against him therefor, which he satisfies, he cannot object to a suit brought for other assessments, that he did not pay the five *per cent.* in cash when he subscribed.—*Ib.* 742

SUMMARY PROCEEDINGS.

1. Where there are several plaintiffs, whose judgments are of the same date, and whose executions came to the sheriff's hands at the same time, the right to suggest to the court that the sheriff could have made the money by due diligence, [Aik. Dig. 175, § 78,] is given to each, and neither can be affected in his right to recover of the sheriff, by the action of any other, or by his failure to act. Therefore, when several plaintiffs, having judgments and executions of equal dignity, severally suggested at the same term of the court, that the sheriff could have made the money on the execution, by due diligence, the sheriff cannot reduce the amount of the recovery, in either of the cases, by proving that judgments had been rendered against him on the other suggestions, sufficient to absorb the value of all the defendant's property subject to sale by execution....*Gary, et al.* v. *Hathaway*.....161
2. In a proceeding before the judge of the county court, by a surety of a sheriff, to compel him to execute a "new bond," every fact must appear upon the record which is necessary to give the court jurisdiction.—*Caskey* v. *The State.* 193

SUMMARY PROCEEDINGS—*continued.*

2. It is therefore necessary that the name of the surety, requiring another bond to be executed, should be stated in the citation—that a particular day should be set for the execution of such "new bond"—and that the judgment of the county court, vacating the office of the sheriff, should state that the sheriff neglected or refused to give such new bond with good and sufficient surety.—*Ib.* 193
3. In a summary proceeding against a constable and his sureties, for failing to pay over money collected by virtue of an execution, the question to be tried is not merely whether money was collected, but is also, whether it was collected by virtue of the particular execution, which the plaintiff describes in his notice; consequently a misdescription of the execution is a fatal defect, and when it is doubtful, whether money was collected on the execution described, or another, the jury must decide upon which it was collected...*Johnson et al.* v. *Gray.* 276
4. A sheriff who takes insufficient security upon a forth-coming bond, cannot be proceeded against by motion, but the party aggrieved thereby must seek redress by action at common law.—*Gary* v. *McCown*.....370
5. The act of 1833, which authorises an officer levying an attachment, to require the plaintiff therein to execute a bond for his indemnity, should it afterwards appear that the property levied on does not belong to the defendant, does not give to the obligee a summary remedy on the bond; and the statutes of 1807 and 1827, in respect to bonds given upon the levy of an execution, cannot, by construction, apply to the case...*Mansony and McLosky* v. *Toulmin.* 474
6. A notice against a defaulting sheriff or constable, is sufficient, if it specifies the term at which the motion is made...*Welch, et als.* v. *Fourier*.....516

See Bank, 4, 7, 8.

See Judgment, 11.

See Pleadings, 58, 59, 61.

See Sheriff and Sureties, 5, 6, 7, 8, 9, 10.

See Statutes, 2.

See Sureties, 2.

See Variance, 4, 5, 6.

SUNDAY.

1. When the term of a circuit court is limited to one week, it expires on Saturday night at 12 o'clock, as no judicial action can be had on Sunday, and a verdict rendered after that hour, is irregular, and will not sustain a conviction.—*Nabors* v. *The State.* 200

SURETIES.

1. L., K. and B. are co-sureties for a defendant in a detinue bond, conditioned to deliver a slave in the event of a recovery: pending the suit, L. desires K., in whose possession the slave has remained, to deliver the same to the sheriff in discharge of the bond. K. refuses, and afterwards delivers the slave to the defendant in the detinue suit, by whom it is run off, and thereby the sureties have to answer on the bond. The slave is afterwards regained, through the exertions of L. and B., and sold. The proceeds, when divided between L., K. and B., fall short of the sum paid by them. If the slave had not been eloign-

SURETIES—*continued.*

ed, it would have sold for a greater price: *Held*, that these circumstances did not warrant an action of assumpsit, by L. against K., and that the evidence was properly excluded in that form of action.—*Long* v. *Kent*. 100

2. When an issue is made, upon the notice issued in a summary proceeding, by one surety against the executor of his co-surety, and a verdict is found by the jury, this is a sufficient action by the defendant and the court, to make the notice a part of the record, and if its allegations are sufficient to sustain the summary jurisdiction, it is unnecessary for the same averments to be repeated in the judgment entry.—*May, ex'r*, v. *Long*. 107

3. The bank is not affected by a conditional execution of a note by a surety, of which it has no knowledge. --*Findley* v. *The State Bank*.....244

4. A sheriff who takes insufficient security upon a forth-coming bond, cannot be proceeded against by motion, but the party aggrieved thereby must seek redress, by action at common law.---*Gary* v. *McCown*.....370

5 A surety to a writ of error bond is not discharged from his liability on the bond because the principal in the judgment, after its affirmance in the appellate court, without the privity or consent of the surety, obtains an injunction out of chancery, to the collection of the judgment.—*Hodges* v *Gewen*, &c. 478

6. When sureties unite with their principal in a plea to the merits, it is an admission of the fact of suretyship...*Welch, et als.* v. *Fourier*. 516

7. Where a factor sells goods, and appropriates the proceeds to his account against the principal without objection by the latter, the surety of the principal for the payment of a demand of equal dignity to the factor, when sued by the latter, cannot object that the appropriation was not so made as first to relieve him from liability.---*Martin* v. *Pope & Son*. 533

8. A factor credited his principal with the proceeds of goods sold, afterwards paid him a part thereof, then sold for him other goods to a much greater amount: *Held*, that a surety of the principal, in an action by the factor, could not claim a deduction from his liability for the sum credited and afterwards paid over.---*Ib.* 533

9. An indulgence *gratuitously* granted by a creditor to the principal debtor, will not operate a discharge of the surety.--*Martin* v. *Pope & Son*.....533

10. A direction by the plaintiff to the sheriff to stay proceedings upon an execution against the principal debtor, without consideration, does not release the surety from the payment of the debt.---*Sawyer* v. *Bradford, assignee*.....572

11. When one co-surety has been compelled by suit to pay the joint engagement, it is not competent for a co-surety, when sued for contribution, to show that the note, as between the principal debtor and the payee, was without consideration.---*Cave, use of Wallace*, v. *Burns*. 780

12. A surety, after paying the amount of the execution issued against the principal and other sureties, as well as himself, is not entitled to have the execution kept alive for his own benefit, either against the principal or co-sureties.---*Morrison, Givhan, et al.* v. *Marvin*. 797

See Chancery, 29.

See Contract, 4.

See Indorser and Indorsee, 2, 3.

SURETIES—*continued.*

See Indorsement, 3.

See Law Merchant, 2.

TENDER.

1. When bank notes are offered in payment, and no objection is made *on that account*, it is a good tender; and this although the bank is in a suspended state; for by the conduct of the party, his adversary is lulled into security, when if objection had been made for that reason, specie would have been demanded.—*Seawell* v. *Henry*. 226

TROVER.

1. Boards, rails and bricks, cut and made from the soil of land belonging to the U. S., and appropriated by the maker, do not pass to one who subsequently purchases the land from the U. S., although the severed chattels are remaining on it; and the maker may maintain trover for their conversion by the person who thus becomes the owner of the land, he showing no connexion between himself and the United States with respect to the severed chattels.—*Carpenter, et al.* v. *Lewis, et al.* 682

TRUST AND TRUSTEE.

1. Where a bill single, not rendered negotiable by endorsement, is entrusted by the payee to an agent to collect, and he sells it for a fair and valuable consideration, to a third person, and he to another, who sues in the name of the payee, to his use, and obtains judgment, a court of equity will consider him a trustee for the payee, and compel him to account for the proceeds.—*May, et al.* v. *Nabors*. 24
2. Under the act of 1829, the circuit court may appoint a trustee, upon the death of the trustee appointed in the deed.—*The State Bank* v. *Smith*. 75
3. Where a deed conveys to trusees, for the use of a daughter, an undivided moiety of real and personal estate, of great value, the grantor and trustees cannot assent to a division of it, through the medium of arbitrators, so as to prevent the creditors of the former, from selling, under execution, his moiety of any part of the property. But it is competent for a court of chancery to cause a division to be made, or to arrest the action of the execution, until the rights of the *cestui que trust* are equitably adjusted.—*Thomas and Howard, trustees, &c.* v. *Davis*. 113
4. Where land is purchased by A. with the money of B., a trust results, by operation of law, in favor of B., although the title be taken by A. in his own name. But where a guardian was indebted to his ward, and purchased land which he declared was for the ward, paid for it with his own money, and put the ward in possession, but took the title in his own name: *Held*, that there was no resulting trust to the ward, and that in the absence of proof of an agreement that the land was to be received in payment of the debt, the ward had no title to it...*Taliaferro* v. *The heirs of Taliaferro*. 404
5. C. delivered certain slaves to S., his creditor, the latter stipulating that when the wife of C. would pay him the debt intended to be secured by a pledge of the slaves, that he would settle them upon trustees to her separate use; the wife offered to

TRUST AND TRUSTEE—*continued.*

pay the amount due to S., and demanded the slaves in obedience to his agreement; which he refused: *Held*, that the contract of S. made him a trustee *sub modo* for the wife, and that the tender of his [illegible] against [illegible] entitled her to go into equity to enforce the execution of the trust.—*Sl[illegible]ers, et al.* v. *Clopton.* 589

6. Where one person receives a conveyance of [illegible], upon a verbal stipulation that he will dispose of it absolutely or conditionally for the benefit of another, he will be compelled to perform his engagement.—*Ib*.....589

7. If one person receives property from another, under an agreement to settle it on trustees for the benefit of the wife of the latter, a court of equity should not refuse to coerce an execution of the trust, because the details of the settlement cannot be ascertained by the most stringent proof.—*Ib*.....589

See Fraud and Fraudulent Conveyances, 6.

See Garnishment and Garnishee, 13.

USURY.

1. The act of 1819, makes the "borrower or party" to a usurious contract, a competent witness to prove the usury; but this statute cannot be so construed as to authorize the indorser or surety of the "borrower or party," when sued, to be a witness to prove the fact, so as to defeat a recovery against him....*Paul* v. *Meek.* 753

2. "The borrower or party" being competent to prove the transaction illegal for usury, the *particular facts* to which he may testify, cannot be defined with precision, but must depend, to a great extent, upon the case itself....*Ib.* 753

VARIANCE.

1. In a summary proceeding against a constable and his sureties, for failing to pay over money collected by virtue of an execution, the question to be tried is not merely whether money was collected, but is also, whether it was collected by virtue of the particular execution, which the plaintiff describes in his notice; consequently a misdescription of the execution is a fatal defect, and when it is doubtful, whether money was collected on the execution described, or another, the jury must decide upon which it was collected.—*Johnson, et al.* v. *Gray*.....276

2. Where a suit is commenced by attachment, the attachment is the initiatory process in the cause, and the defendant cannot, by demurring, bring its defects to the view of the court, or avail himself of a variance between it and the declaration; consequently a revising court will not look behind the declaration to ascertain whether the suit is brought for a less sum than the primary court could take jurisdiction of, unless the question was there regularly presented.—*Roberts* v. *Burke*.....348

3. When the plaintiff does not undertake to set out the libel in *haec verba*, or according to its tenor, the omission or alteration of a letter, which does not alter the meaning, will not be a variance.—*Weir* v. *Hoss and Wife.* 881

4. Where a notice of a motion for judgment in favor of a Bank states the time when the note was discounted, so as to show that it was before it bears date, this statement, as it is unnecessary, may be treated as surplusage.----*Griffin* *The Bank of the State of Alabama.* 908

VARIANCE—*continued.*

5. A notice at the suit of a Bank need not be dated, unless the date is made material by a reference to it, [illegible] in[illegible]ating the time when the motion will be made, &c.; and althou[illegible] [illegible]orsement of its receipt by the sheriff shows that the notice was plac[illegible] [illegible]ands before the maturity of the debt, yet if it is not served until aft[illegible] [illegible]ebt is due, no objection can be made to this defect in the notice.—*Ib.* 908
6. The plea of *non assumpsit* to a notice of a motion for judgment at the suit of the Bank, throws upon the plaintiff the *onus* of proving the material facts stated in the notice; and if the note sought to be recovered is misdescribed as to the time of its maturity, the variance will be fatal to the motion.---*Ib.* 908

VENDOR AND VENDEE.

1. *Quere?* Will a purchaeer at a sheriff's sale be affected by a variance between the *venditioni exponas*, and the order under which it issued, if the writ is not void.—*Allen* v. *Best*..... 234
2. Neither fraud or failure of consideration can be given in evidence to defeat the recovery at law of a note given for the price of land, when a deed containing covenants of warranty running with the land, has been accepted by the purchaser, his relief is in a court of equity.—*Starke, et al.* v. *Hill* 785
3. The cancellation ofa deed to land will not revest the title in the grantor, but if the vendee delivers up his unregistered deed to be cancelled, he places it in the power of the latter either to sell or incumber the land; and a *bona fide* purchaser or incumbrancer without notice, would have the paramount interest, and this, although he did not acquire it directly from the vendor, but from one to whom the vendee delivered the deed under a parol contract for a sale,that he might exchange it with the vendor for a deed made directly to himself...*Mallory* v. *Stodder*. 801

See Ejectment, and Trespass to try Title, 2.

See Lien, 4.

VERDICT.

1. If there is a general verdict that the defennant is guilty of an unlawful detainer, and the judgment is "according to the verdict," both will be referred to the complaint, which, if sufficient in the description of the lands, and of the offence, will sustain the judgment.---*Powers* v. *David*. 9
2. A finding by the jury for the plaintiff, on an issue to the merits, includes all the facts necessary to the ascertainment of the defendant's liability, unless a statute requires the facts to be specially found... *Welch, et als.* v. *Fourier*. 516

See Jury, 1.

WILL, AND PROBATE OF.

1. Where certain persons describing themselves as sisters and brothers of the deceased, bring error to reverse an *ex parte* order, admitting the supposed will of the decedent, to probate, it cannot be intended (in the absence of any affirmation in the record,) that they are the nearest of kin in interest, and the writ of error will be dismissed.---*The heirs and distributees of Hilll* v. *Hill's Ex'rs* 166
2. *Semble:* It is competent for the judge of the county court to set aside the probate of a will, which he had previously allowed without proof, or upon insuffici-

WILL, AND PROBATE OF—*continued.*

ent proof, and without notice to the widow and next of kin, as directed by statute.---*Ib* 166

3. A testator made his will in these terms: "That all my property, both real and personal. of which I am now possessed, or may hereafter accrue, be retained and continued together, till my youngest child may have arrived at lawful age; at which time all the above property, with its increase, from now on to the time of my youngest child arriving at lawful age, to be equally divided among all my lawful heirs." His property consisted of lands, slaves, stock, plantation utensils, &c. He died leaving a widow and five infant children. *Held*, that the intention to be gathered from these expressions, in connexion with the circumstances, is, that the family relation between the wife, children, and slaves, shall be continued, and that the plantation be carried on for the benefit of the family. The wife, under this will, takes a vested interest in one-sixth part of the estate, to be divided at a future period.---*McLeod, et al.* v. *McDonnel and Wife* 236

4. The provision for the wife is inconsistent with dower and distribution of the same estate, consequently, without any express legislation upon the subject, she would, in equity, be put to her election.---*Ib* 236

5. Where a testator, after specially bequeathing slaves and other personal property to his daughters, declared his meaning to be, that they should "inherit the above bequests, and if no lawful heirs of their bodies, then to revert to the family or estate;" "*Held*, that the limitation was wholly indefinite, reaching to the remotest descendants of the first takers, and being uncontrolled by any thing which preceded or followed it, the daughters took an absolute estate.---*Darden's Adm'r, et al.* v. *Burn's Adm'r, and another* 362

6. *Semble*, that where personal property is given to the *sole and separate* use of a *feme covert*, she may, as incident to such an interest, dispose of it by will; and although she be entitled only to the profits derivable from the enjoyment of the property, she may, under an authority from her donor, declare who shall enjoy it after her death.—*Lewis, et al. by their next friend*, v. *Hudson and another* 463

7. A testator, by his will, gave to his wife a life estate in one-third part of his land, a fifth part of his estate absolutely. He then proceeded to declare his intention to do equal justice to his children, and after reciting that he had previously given to a daughter, Mrs W., certain property, in trust, which he estimated at one dollar, proceeded thus: "Now it is my will that after the payment of all my just debts, and allotting to my wife her portion, as herein before directed, to add to the residue of my estate of every description, the said sum of one dollar, the value of the property conveyed in trust for the use of Mrs. W., and to divide the sum total after making such addition, into seven parts, and I do hereby direct and require my executors to distribute and pay over the residue of my estate, both real and personal, in the following manner, to-wit; after deducting from one of said seven parts the sum of one dollar to pay over to said trustees the residue of said portion of Mrs. W., to be held for her use and benefit, and that of her heirs, and to pay to my daughters C. W., M. A., L. C., M. H., and to my sons J. W. J. and W. B J. one-seventh part of the residue of my estate as aforesaid, or to their legal representatives respectively. *Held*, that the executors were invested by the will with the

WILL, AND PROBATE OF—*continued.*

power of selling the lands of the deceased to enable them to make distribution among the legatees....*Winston* v. *Jones and Haigh*.....550

8. A father, by deed, gave to the heirs born of his daughter's body, a female slave, providing therein that he should retain the slave in his possession during his life, and at his decease that she should be "in full possession of the heirs born" of his daughter: *Held*, that this was a testamentary paper and might be proved as such; and that *all the children to which the daughter gave birth*, might claim an equal interest in the slave and her increase, under the deed as an executory devise.—*Shepherd, et al.* v. *Nabors*.....631

9. A legatee of personal property cannot maintain an action for the recovery of his legacy, unless the will has been regularly admitted to probate.—*Ib* 631

See Dower, 2, 3.

WITNESS.

1. A defaulting witness, in a civil cause, may, upon *scire facias* excuse himself for his failure to attend in obedience to the *subpœna*, by his own oath.—*Livingston* v. *Lucas*.....147

2. Heirs or distributees are not competent witnesses for the executor or administrator to establish a claim in favor of the estate, although they execute releases of all their interest in the demand in suit.—*Williams' ex'rs* v. *Temple, adm'r*. 656

3. A witness cannot be excluded by proving his confessions of an interest in the suit.—*Bates* v. *Ryland*.....668

4. A co-maker of a promissory note is a competent witness to prove a presentment of the note to the executor of a joint maker of the note—*Cawthorne* v. *Weisinger*.....714

See Evidence, 20, 26, 29, 37, 49.

See Usury, 1.

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